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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 174

ROBERT SEALFON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SEALFON,

Defendant-Appellant.

APPENDIX TO APPELLANT'S BRIEF

INDEX

	PRINTED PAGE
Statement Under Rule XIII	1
Docket Entries	3
Indictment on Appeal	8
Hearing on Motion to Quash—On Plea in Bar	34
Testimony	56
Government's Opening	58
Motions and Arguments	343
Defendant's Opening	359
Motion to Dismiss Indictment	476
Defendant's Summation	478
Government's Summation	517
Charge of the Court	542
Requests to Charge	562
Verdict	565
Motion to Set Aside Verdict	567
Sentence	569

Exceptions noted, allowed and sealed appear on following printed pages:

52; 53; 54; 60; 65; 81; 95; 100; 101 (twice); 137; 147; 150; 160; 166; 174; 211; 240; 241; 242; 243; 248; 249; 250 (twice); 251; 252 (twice); 253 (twice); 258; 262; 273; 276; 315; 316; 319; 333; 337; 358; 359; 477; 560; 561; 567.

PRINTED PAGE

Notice of Appeal 578

Grounds of Appeal 582

Assignment of Errors 584

Stipulation as to Exhibits 587

Witnesses for Government:

Charles W. Quick
- Direct 83
- Cross 91

Recalled
- Cross 96

Eyare M. Hutson
- Direct 95
- Cross 96

Gazelle Blaufox
- Direct 99

Sanford J. Doctors
- Direct 100
- Cross 109
- Redirect 127
- Recross 134

Murray Greenberg
- Direct 136
- Cross 144
- Redirect 217

PRINTED PAGE

Recalled
Redirect 317
Recross 326
Rebuttal
Direct 468
Cross 469

Hazel Petrie
Direct 224
Cross 231

Evelyn Treat
Direct 233
Cross 234
Redirect 236
Recross 237

Robert B. Galloway
Direct 238
Cross 244
Redirect 247

Elbert W. Baker
Direct 247
Cross 254
Redirect 256

John Robert Jones
Direct 256
Cross 258
Redirect 260
Recross 261

PRINTED PAGE

Joseph E. Cody
Direct 261
Cross 265
Redirect 265

Witnesses for Government:

Vincent Gage
Direct 265

Walter F. Howes
Direct 267
Cross 277
Recalled
Direct 312
Rebuttal
Direct 465

Conrad L. Wedel
Direct 277
Cross 278

Louis Schuster
Direct 282
Cross 284

Frank Citron
Direct 285
Cross 296
Redirect 309

Charles Kranski
Direct 311

PRINTED PAGE

Harold R. Lehmann
Direct 336
Cross 338
Redirect 342

Louis Brock
Rebuttal
Direct 464

Ivy Millar
Direct 466

Della McNeil
Rebuttal
Direct 467

Witnesses for Defendant:

Irving Fox
Direct 366

Louis Brock
Direct 368
Cross 373

Robert Sealfon
Direct 377
Cross 412
Redirect 454
Surrebuttal
Direct 471
Cross 473

PRINTED PAGE

Herman E. Sprigade
Direct 457
Cross 458

Ronald Hellen
Direct 458
Cross 459
Redirect 459

John M. Search
Direct 459
Cross 460

David N. Sugarman
Direct 460
Cross 460

Sol Lehman
Direct 461
Cross 461

Bernard Newman
Direct 461

Proceedings in U. S. C. C. A., Third Circuit. 588
Order assigning judge 588
Minute entry of argument 588
Opinion, Stephens, J. 589
Judgment 596
Clerk's certificate 596
Order extending time within which to file petition for certiorari 598
Order allowing certiorari 598

PAGES OF TRANSCRIPT

*Government's Exhibits**:

(Received into evidence at pages indicated)

G- 2—Letter from Sanford J. Doctors re withholding tax dated June 26, 1943 133

G- 3—Checks payable S. J. Doctors 135

G- 4—Letters and Agreement 145

G- 5—Same as Defendant's Exhibit marked D-2 218

G- 6—Same as Defendant's Exhibit marked D-4 218

G- 7—Same as Defendant's Exhibit marked D-3 218

G-10—Certified papers showing establishment and existence of Rutherford Ration Board 224

G-11—Certificate relating to Count 1 248

G-14—Certificate dated December 7, 1943, relating to Count 4 249

G-15—Certificate of Jan. 14, 1944, relating to Count 5 .. 250

G-16—Certificate of Jan. 18, 1944, relating to Count 6.. 250

G-17—Certificate of Feb. 16, 1944, relating to Count 7 .. 241

G-18—Certificate of Feb. 28, 1944, relating to Count 8 .. 251

* Omitted pursuant to stipulation.

PAGES OF TRANSCRIPT

*Government's Exhibits (Continued)**

G-19—Certificate of March 22, 1944, relating to Count 9 251

G-20—Certificate of March 27, 1944, relating to Count 10 252

G-21—Certificate of April 4, 1944, relating to Count 11 252

G-22—Certificate of April 6, 1944, relating to Count 12 253

G-23—Group of Certificates 258

G-24—27 folders of ration board records 258

G-25—3 applications identified by Galloway 243

G-26—Records of National Sugar Refining Co. re Fresh Grown Preserve sugar deliveries 263

G-26a—Summary and analysis of G-26 264

G-27—Records of Refined Syrups & Sugars, Inc., re Fresh Grown Preserve sugar deliveries 267

G-27a—List of certificate number re G-27 267

G-28—Chart (Walter F. Howes) 274

G-29—Chart (Howes) 276

G-30—Vouchers and Checks re syrup purchases 278

* Omitted pursuant to stipulation.

PAGES OF TRANSCRIPT

*Government's Exhibits (Continued)**

G-31—Chart (Louis Schuster) 284

G-32—Citron records 310

G-33—Chart re Exhibit G-32 (Howes) 315

G-34—Chart re Exhibits G-5, G-6, G-7 (Howes) 316

G-35—R.315 application, Dec. 23, 1942, identified by Sealfon as filled out by him 463

G-36—Letters identified by Sealfon as submitted by him to ration board 463

(Marked for Identification at pages indicated)

G- 1—Copies of O.P.A. Regulations 90

G- 8—Statement of Dec. 11, 1945 to U. S. Attorney 223

G- 9—Statement of Jan. 3, 1946 to U. S. Attorney 223

G-11—Certificate relating to Count 1 (in evidence) 248

G-12—Certificate relating to Count 2 227

G-13—Application and Certificate dated Nov. 7, 1943 227

---

* Omitted pursuant to stipulation.

PAGES OF TRANSCRIPT

*Defendant's Exhibits:**

(Marked into evidence at pages indicated)

D- 1—Certificate of Acquittal of defendant under Indictment #3522c 37

D- 2—Correct copy of stenographic minutes of trial, including summation and counts, charge to jury 38

D- 3—Copy of indictment #3522c which is the conspiracy indictment on which defendant was acquitted 51

D- 5—Application of February 3, 1943, sale to Pan Continental Export Co. with invoices attached (in evidence) 454

D- 6—Application of February 9, 1943, R-315, with invoices attached (in evidence) 454

D- 9—Three checks to Citron from Sealfon (in evidence) 462

D-10—Five envelopes containing checks and original purchase orders from April 29, 1943, to June 23, 1944, identified by Citron (in evidence) 409

D-11—Receipts, etc. showing syrup deliveries by Sero Syrup in January, 1943, to canteen, Brooklyn, N. Y. 374

D-12—Receipts showing syrup deliveries by Sero Syrup in February, 1943, to canteen, Brooklyn, N. Y. 374

* Omitted pursuant to stipulation.

PAGES OF TRANSCRIPT

*Defendant's Exhibits (Continued)**

D-13—Sign posted in vending machine by Sealfon 375

D-14—Copy of contract with changes initialled and signed by Sealfon and Greenbergs 395

D-15—Check stubs identified by Sealfon as original records of his company 410

D-16—Ration order No. 11 455

(Marked for Identification at pages indicated)

D- 2—Certified checks to Fresh Grown Preserve Corp. 181

D- 3—Five certified checks to Fresh Grown Preserve Corp. 182

D- 4—Two certified checks to Fresh Grown Preserve Corp. 183

D- 5—Application of Feb. 3, 1943, sale to Pan Continental Export Co. with invoices attached (in evidence) 454

D- 6—Application of Feb. 9, 1943, R-315, with invoices attached (in evidence) 454

D- 7—Letter dated March 29, 1943 206

D- 8—Letter from Franklin to Greenberg 211

D- 9—Three checks to Citron from Sealfon (in evidence) 462

D-10—Five envelopes containing checks and original purchase orders from April 29, 1943, to June 23, 1944, identified by Citron 409

* Omitted pursuant to stipulation.

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SEALFON,

Defendant-Appellant.

Statement Under Rule XIII

The indictment accuses the defendant, Robert Sealfon, of violating Title 18, Section 72, U. S. C. A. (uttering false writing for purpose of defrauding the United States). Upon arraignment he pleaded not guilty.

On January 8, 1946 (the date of the trial) the defendant was permitted to withdraw his plea of not guilty in order to make a motion to quash the indictment upon the ground that (a) the trial of this indictment constitutes double jeopardy; (b) that the trial of the defendant upon Indictment No. 3522c, which resulted in a verdict of not guilty after trial before the Honorable Thomas F. Meaney, on the 19 day of December, 1945, was conclusive upon the Government upon all of the issues raised or could be raised upon the indictment at bar. After argument the motion was denied, and the plea of "not guilty" reinstated.

The indictment proceeded to trial on January 8, 1946 and was concluded on January 16, 1946. The defendant was found guilty.

On April 15, 1946, judgment was pronounced and duly entered by the Honorable Thomas F. Meaney, the Trial Judge. The defendant was sentenced to serve 5 years on

each of Counts 1 to 12 inclusive, to run concurrently, and in addition thereto was fined $1,000.00 upon each of the said counts. Bail was fixed in the sum of $5,000.00, which was posted by the defendant on April 15, 1946.

The notice and grounds of appeal were filed April 16, 1946. The defendant's time to file his bill of exceptions, assignment of errors and brief was extended respectively to the 15th days of July and September, 1946.

Upon the trial the Government appeared by Honorable Edgar H. Rossbach, U. S. Attorney, by Vincent E. Hull, Esq., Assistant U. S. Attorney.

The defendant was and still is represented by Hyman Barshay, Harry Gittleson and Anthony A. Calandra, Esqs.

Docket Entries

3523C

Title of Case

THE UNITED STATES

vs.

J. S. 3 FRESH GROWN PRESERVE CORP., N. J., a body corporate
J. S. 3 MURRAY GREENBERG
J. S. 3 LEO GREENBERG
J. S. 3 ROBERT SEALFON

Attorneys
For U. S.

For Defendant:

F. G. P. Corp.—GEORGE R. SOMMERS, ESQ.
M. G.—GEORGE R. SOMMERS, ESQ.
L. G.—GEORGE R. SOMMERS, ESQ.
R. S.—HYMAN BARSHAY, ESQ.
R. S.—ANTHONY A. CALANDRA, ESQ.

Docket Entries

Counts—12

Abstract of Costs	*Amount*
Fine, Fresh Grown Preserve Corp.	12000.00
" Murray Greenberg	12000.00
" Leo Greenberg	12000.00
" Robert Sealfon	12000.00

CASH RECEIVED AND DISBURSED

Date	*Name*	*Received*
4-15-46	A. A. C. Esq.	5.00

Docket Entries

PROCEEDINGS

Title 18 U. S. C. Sec. 72

Date	
1945	
Oct. 2	Indictment for uttering false writing for purpose of defrauding the United States, filed.
3	Notice of Allocation, filed. (Newark)
1946	
Jan. 8	Fresh Grown Preserve Corp.—Plea—Guilty. (Meaney)
8	Murray Greenberg—Plea—Guilty. (Meaney)
8	Leo Greenberg—Plea—Guilty. (Meaney)
8	Robert Sealfon—Plea—Not Guilty. (Meaney)
8	Robert Sealfon—Plea of Not Guilty withdrawn for purpose of addressing motion. (Meaney)
8	Robert Sealfon—Ordered motion to quash indictment, denied. (Meaney)
8	Robert Sealfon—Hearing on motion on plea in bar. Plea in bar overruled. (Meaney)
8	Robert Sealfon—Plea of not guilty restored. (Meaney)
8	Trial moved as to Robert Sealfon before Hon. Thomas F. Meaney, Judge and Jury.
9	Trial continued Motion for dismissal of indictment, denied.
10	Trial continued
11	Trial continued Motion for dismissal of indictment and motion for a direction of verdict of acquittal. Decision reserved.
15	Trial continued Ordered motions denied

Docket Entries

Date	
1946	
Jan. 16	Trial continued
	Motion for dismissal of indictment or for a direction of verdict of not guilty, denied Robert Sealfon
	Verdict: Guilty on all counts.
	Bail fixed at $5,000.00
	Paroled in custody of counsel.
	Ordered Clerk accept bail.
	Motion to set aside verdict, denied.
Feb. 21	Robert Sealfon—Notice of Appearance, filed. (See 3481c)
Mar. 13	Ordered motion for adjournment on sentence date, denied. (Meaney)
Apr. 15	Fresh Grown Preserve Corp.—Sentence: Fine of $1,000.00 on each of Counts 1 to 12, inc., to run concurrently with sentence imposed on Ind. 3522c., and fine of $1000.00 on each of Counts 1 to 12, inc. (Meaney)
15	Leo Greenberg—Sentence: Three years on each of Counts 1 to 12, inc., to run concurrently, and concurrently with sentence imposed on Ind. 3522c., and fine of $1000.00 on each of Counts 1 to 12, inc. (Meaney)
15	Murray Greenberg—Leo Greenberg—Ordered execution of sentence stayed until May 6, 1946. (Meaney)
15	Robert Sealfon—Sentence: Five years on each of Counts 1 to 12, inc., to run concurrently; & fine of $1,000.00 on each of Counts 1 to 12, inc. (Meaney)
15	Robert Sealfon—Ordered motion in arrest of judgment, denied. (Meaney)
15	Robert Sealfon—Ordered application that bail be fixed pending appeal granted. (M

Docket Entries

Date	
1946	
Apr. 15	Robert Sealfon—Ordered bail of $5000.00 fixed pending appeal. (Meaney)
16	Robert Sealfon—Notice and Grounds of Appeal, filed Apr. 15, 1946.
	Consent
16	Robert Sealfon—Order for preparation of Record on Appeal, filed, 4-15-46. (Meaney)
16	Robert Sealfon—Order to admit to bail, filed Apr. 15, 1946. (Meaney)
17	Fresh Grown Preserve Corp.—Judgment, filed. (Meaney)
17	Murray Greenberg—Judgment and commitment, filed. (Meaney)
17	Leo Greenberg—Judgment and commitment filed. (Meaney)
17	Robert Sealfon—Judgment and commitment filed. (Meaney)
May 2	Murray Greenberg and Leo Greenberg—Ordered stay of execution of sentence continued to 5-21-46. (Meaney)
20	Murray Greenberg—Leo Greenberg—Ordered application to have stay of execution of sentence continued to May 27, 1946, denied. (Meaney)
28	Consent order for preparation of record on appeal filed. (Meaney)
June 6	Order permitting the inspection and copying of record, filed. (Meaney)
7	Leo Greenberg—Copy of judgment and commitment with Marshal's return thereon, filed.
"	Murray Greenberg—Copy of judgment and commitment with Marshal's return thereon, filed.
July 3	Stipulation as to exhibits filed.

Indictment on Appeal

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, *ss.*:

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1945.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

COUNT I.

(1) That on all of the days and dates hereinafter mentioned there was duly appointed, established and operating at Rutherford, Bergen County, New Jersey, a certain board or body, an agency of the United States, known and designated as Local War Price and Rationing Board No. 24.2.11 (hereinafter in this indictment sometimes called and referred to as the Board), the said Board having territorial jurisdiction over a part of said Bergen County, including Lyndhurst, and receiving and acting upon special applications for sugar purchase certificates to replace sugar used and consumed in the manufacture and production of goods and materials sold and delivered to and destined to be sold and delivered to and upon their orders to certain departments and organizations of the United States, including the United States Army, Navy, Marines, Coast Guard, Food Distribution Administration, Maritime Commission, War Shipping Administration, Office of Lend Lease Administration, Army Exchange Service, Ship Service Department afloat, and other affiliates and organizations aiding and assisting the above named in the prose-

cution of the existing war and in caring for the needs and necessities of the armed forces of the United States and sold and delivered for export and for foreign consumption, hereinafter called and referred to as Exempt Agencies;

(2) That on all of the days and dates hereinafter mentioned, Fresh Grown Preserve Corp., N. J. (hereinafter in this indictment sometimes called and referred to as the Corporation), was a body corporated, organized and existing under and by virtue of the laws of the State of New Jersey and engaged in and carrying on the business of manufacturing, making and producing and in the sale and distribution of syrups, preserves and jellies and of imitation jams, jellies, marmalades and preserves, at said Lyndhurst, and was known as an industrial user of sugar, having a fixed quota or sugar basis assigned and determined for certain periods, which quota or base requirements the said Corporation was not permitted to exceed except as its products might be made for and sold and delivered to or upon the orders of such Exempt Agencies;

(3) And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that on or about the 19th day of October, in the year 1943, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court,

FRESH GROWN PRESERVE CORP., N. J.,
a body corporate,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

(hereinafter in this indictment sometimes called and referred to as the defendants), for the purpose of defraud-

ing the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates to replace sugar, did, wilfully, knowingly, unlawfully and feloniously utter and publish as true and cause to be uttered and published as true to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered by the said Corporation to Sero Syrup Co. (a trade name adopted and used by the said Robert Sealfon in conducting his business), for and for the use of the Brooklyn Navy Yard, and the Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit;

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 10/1/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, New York

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gallon	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, New York"

which said false, forged and counterfeited writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 1st day of October, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the uses of the said Brooklyn Navy Yard or for the Navy Yard, Navy Department, Brooklyn, New York, or elsewhere, or for or for the use of any Exempt Agency, but did sell and deliver to the said Robert Sealfon for his own use and benefit the said 6000 gallons, the said writing being entirely false, forged and counterfeited and representing no sale or delivery of sugar products to any Exempt Agency, the said defendants knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 3rd day of November, in the year 1943, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates to replace sugar, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered by the said Corporation to Sero Syrup Co., (Robert Sealfon) for and for the use of Brooklyn Navy Yard, Brooklyn, N. Y., and for Navy Yard, Navy Department, Brooklyn, N. Y., and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 10/12/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gallon	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 12th day of October, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the Brooklyn Navy Yard, Brooklyn, N. Y., or the Navy Yard, Navy Department, Brooklyn, N. Y., or elsewhere, or to or for any other Exempt Agency, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, 6000 gallons of vanilla syrup, the said writing being entirely false, forged and counterfeited, and representing no sale or delivery of sugar products to any Exempt Agency, the said defendants then and there knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this Indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 26th day of November, in the year 1943, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States, and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did, wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered by the said Corporation to Sero Syrup Co. (Robert Sealfon) for and for the use of Navy Yard, Brooklyn, N. Y. and Navy Yard, Navy Department, Brooklyn, N. Y. and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 10/28/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gallon	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 28th day of October, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the said Navy Yard, Brooklyn, N. Y. or the said Navy Yard, Navy Department, Brooklyn, N. Y., or elsewhere, or to any Exempt Agency whatever, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, 6000 gallons of vanilla or other syrup, the said writing being entirely false, forged and counterfeited and representing no sale or delivery of sugar products to or for any Exempt Agency, the said defendants then and there knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 7th day of December, in the year 1943, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered by the said Corporation to Sero Syrup Co. (Robert Sealfon), for and for the use of Navy Yard, Brooklyn, N. Y., and Navy Yard, Navy Department, Brooklyn, N. Y., and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 11/8/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn,—N. Y.

Shipped to: For Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gallon	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited, in this, that the said Corporation did not on or as of the 8th day of November, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the said Navy Yard, Brooklyn, N. Y. or the said Navy Yard, Navy Department, Brooklyn, N. Y., or to or for any other Exempt Agency whatever, but did sell and deliver to the said Robert Sealfon for his own use and benefit, 6000 gallons of vanilla or other syrup, the said writing being entirely false, forged and counterfeited and representing no sale or delivery of sugar products to or for any Exempt Agency, the said defendants, then and there knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT V.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 5th day of January, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States, and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon), for and for the use of Brooklyn Navy Yard, Brooklyn, N. Y. and Navy Yard, Navy Department, Brooklyn, N. Y., and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 11/29/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gallon	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of November 29, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of Brooklyn Navy Yard, Brooklyn, N. Y. or the said Navy Yard, Navy Department, Brooklyn, N. Y., or to or for the use of any Exempt Agency, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, the said 6000 gallons of vanilla or other syrups, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to any Exempt Agency, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT VI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 18th day of January, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did, wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon), for and for the use of Brooklyn Navy Yard, Brooklyn, N. Y., and Navy Yard, Navy Department, Brooklyn, N. Y., and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 12/8/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gal.	.70	gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 8th day of December, 1943, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of Brooklyn Navy Yard, Brooklyn, N. Y. or the Navy Yard, Navy Department, Brooklyn, N. Y., or elsewhere, or to or for any Exempt Agency, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, 6000 gallons of vanilla or other syrup, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to any Exempt Agency, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT VII.

And the Grand Jurors aforesaid, upon their oaths, aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 16th day of February, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing, purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon), for and for the use of Brooklyn Navy Yard, Brooklyn, N. Y., and Navy Yard, Navy Department, Brooklyn, N. Y., and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 12/30/43
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 30th day of December, 1943, sell and deliver to said Sero Syrup Co., 6000 gallons of vanilla syrup for and for the use of the said Brooklyn Navy Yard, Brooklyn, N. Y., or the Navy Yard, Navy Department, Brooklyn, N. Y., or to or for the use of any Exempt Agency, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, 6000 gallons of vanilla or other syrup, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to any Exempt Agency, the said defendants, then and there knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT VIII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 29th day of February, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon) for and for the use of Brooklyn Navy Yard, Brooklyn, New York, and Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 1/12/44
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not, on or as of the 12th day of January, 1944, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the said Brooklyn Navy Yard, Brooklyn, New York, or the Navy Yard, Navy Department, Brooklyn, New York, nor to or for the use of any Exempt Agency, but did sell and deliver to the said Robert Sealfon, for his own use and benefit, 6000 gallons of vanilla or other syrups, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to or for any Exempt Agency, the said defendants, then and there knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 22nd day of March, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon), for and for the use of Brooklyn Navy Yard, Brooklyn, New York, and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 1/28/44
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to Gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 28th day of January, 1944, sell and deliver to Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of Brooklyn Navy Yard, Brooklyn, New York, or Navy Yard, Navy Department, Brooklyn, New York, or to or for the use of any Exempt Agency, but did sell and deliver to the said Robert Sealfon, 6000 gallons of vanilla or other syrups for his own use and benefit, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to or for any Exempt Agency, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT X.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 29th day of March, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon), for and for the use of Brooklyn Navy Yard, Brooklyn, New York, and Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 2/5/44
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
575 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not on or as of the 5th day of February, 1944, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the said Brooklyn Navy Yard, Brooklyn, New York, or the Navy Yard, Navy Department, Brooklyn, New York, nor to and for the use of any Exempt Agency whatever, but did sell and deliver to the said Robert Sealfon for his own use and benefit, 6000 gallons of vanilla or other syrups, the said writing being entirely fictitious, false, forged and counterfeited and representing no sale or delivery of sugar products to or for any Exempt Agency, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT XI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 4th day of April, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG and
ROBERT SEALFON,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation, sugar purchase certificates for replacement, did, wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods sold and delivered to Sero Syrup Co. (Robert Sealfon) for and for the use of Brooklyn Navy Yard, Brooklyn, New York, and Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J.
Newark & Page Avenues
Lyndhurst, N. J.

Date 2/12/44
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not, on or as of the 12th day of February, 1944, sell and deliver to the said Sero Syrup Co., 6000 gallons of vanilla syrup for or for the use of the Brooklyn Navy Yard, Brooklyn, New York, or the Navy Yard, Navy Department, Brooklyn, New York, nor to and for the use of any Exempt Agency whatever, but did sell and deliver to the said Robert Sealfon for his own use and benefit, 6000 gallons of vanilla or other syrups, the said writing being entirely fictitious, false, forged and counterfeited, and representing no sale or delivery of sugar products to any Exempt Agency, they, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count XII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby present, re-allege and incorporate herein, all the allegations, matters and things set forth in Paragraphs 1 and 2 of Count I of this indictment, as fully as if set forth, and do further upon their oaths present,

That on or about the 6th day of April, in the year 1944, at Rutherford, in the County of Bergen and State and District of New Jersey, and within the jurisdiction of this Court, the said

Fresh Grown Preserve Corp., N. J.,
Murray Greenberg,
Leo Greenberg and
Robert Sealfon,

for the purpose of defrauding the United States and to induce the said Board to issue to the said Corporation sugar purchase certificates for replacement, did, wilfully, knowingly, unlawfully and feloniously, utter and publish as true and cause to be uttered and published as true, to and upon the said Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered to Sero Syrup Co. (Robert Sealfon) for and for the use of Brooklyn Navy Yard, Brooklyn, New York, and Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit,

"FRESH GROWN PRESERVE CORP., N. J:
Newark & Page Avenues
Lyndhurst, N. J.

Date 2/18/44
Inv. No.
Order No.
Via Ex. Whse.
Terms Net Cash
Salesman

Sold to: Sero Syrup Co.
578 Manhattan Ave.
Brooklyn, N. Y.

Shipped to: For Brooklyn Navy Yard
Brooklyn, N. Y.

Number of Pieces	*Packing & Size*	*Commodity*	*Price*	*Unit*	*Amount*
6000	Gallons	Vanilla Syrup 32° Baume 6.31 lbs. Sugar to gal.	.70	Gal.	4200.00

For Navy Yard
Navy Department
Brooklyn, N. Y."

which said writing was false, forged and counterfeited in this, that the said Corporation did not, on or as of the 18th day of February, 1944, sell and deliver to the said Sero Syrup Co., for or for the use of Brooklyn Navy Yard, Brooklyn, New York, or the Navy Yard, Navy Department Brooklyn, New York, nor to any Exempt Agency whatever, 6000 gallons of vanilla syrup, but did sell and deliver to the said Robert Sealfon for his own use and benefit, 6000 gallons of vanilla or other syrups; the said writing being entirely fictitious, false, forged and counterfeited, and representing no sale or delivery of sugar products to any Exempt Agency, they, the said defendants, then and there, knowing the same to be false, forged and counterfeited; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) EDGAR H. ROSSBACH
EDGAR H. ROSSBACH
United States Attorney

On Motion to Quash

On Plea in Bar

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

3523c

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SEALFON,

Defendant.

Newark, N. J. Tuesday, Jan. 8, 1946.

Before: MEANEY, *J.*

APPEARANCES:

For the United States of America:
VINCENT E. HULL, Esq.

For the defendant:
HYMAN BARSHAY, Esq.
HARRY GITTLESON, Esq.
ANTHONY CALANDRA, Esq.

Mr. Hull: Your Honor, will you permit me to move the admission of Mr. Barshay?

The Court: I find myself in the situation lately of being asked to admit counsel from other states in a very alarming number. I don't know whether our lawyers meet with a situation of comity in other jurisdictions, but I do think that Jersey counsel should be engaged in a great many of these cases which are of rather grave importance; and that is for the protection of the defendants as well as because of the general regulation that it is by sufferance that outside

counsel are permitted to plead. Do you have a Jersey representative, Mr. Barshay?

Mr. Barshay: I have Mr. Calandra to represent me. Mr. Gittleson is my law partner.

The Court: I don't care about that; I am talking about the general situation.

Mr. Barshay: Oh, I beg your pardon.

The Court: I have permitted you to appear before, and while it is true it is the same defendant, it is a different case. You are not admitted in this district and the ordinary procedure is to get New Jersey counsel. Now, is Mr. Calandra your New Jersey representative?

Mr. Barshay: He is the one who represented me.

The Court: And he is of record in this case?

Mr. Barshay: He was here on the day of pleading, your Honor.

The Court: All right. I must have a Jersey lawyer present your partner, because you are here by courtesy so I will ask Mr. Calandra to present your associate.

Mr. Calandra: May it please your Honor, may I present Mr. Harry Gittleson of the New York bar, a partner of Mr. Barshay and a present member of the New York State Assembly.

The Court: Is he a member of the bar of New York, and is he admitted to practice in the federal courts in New

—3—

York?

Mr. Calandra: He is, sir, admitted to practice.

The Court: I recognize his exalted status as a member of the Assembly and don't envy him the problems he will be met with when he starts to pass on the renting situation. I am more concerned about his right of entree here.

Mr. Calandra: Member of the New York bar since 1924.

The Court: And admitted in the federal courts?

Mr. Calandra: Admitted to the federal courts in all the districts in New York.

The Court: I shall be happy to have you, sir, for the purposes of this case.

Mr. Barshay: Now may we discuss procedure at the side bar with Mr. Hull, your Honor?

The Court: Yes. You had better come up and give us the benefit of your advice, counsellor (to Mr. Calandra).

(Colloquy at side bar.)

Mr. Barshay: With your Honor's permission, may we first withdraw the plea of not guilty hertofore interposed this morning in behalf of the defendant Robert Sealfon to indictment number 3523c.

The Court: Now the plea is withdrawn; the motion is what, to quash the indictment?

Mr. Barshay: I beg your pardon?

—4—

The Court: What is your motion?

Mr. Barshay: The motion is to dismiss the indictment, but before we do that may we offer in evidence the certificate of acquittal of the defendant Robert Sealfon?

The Court: I think probably you had better make your motion first; just formally state the motion.

Mr. Barshay: All right. May I present to your Honor Mr. Gittleson?

The Court: Yes. Without arguing the motion, Mr. Gittleson, just for the purpose of establishing the proceeding, the plea has been withdrawn. You now desire to make a motion to do what?

Mr. Gittleson: To quash the indictment, sir, upon the ground, one, that the trial of this indictment before your Honor today constitutes double jeopardy; and upon the further ground that the prior judgment is conclusive on the government as to all the issues raised in this indictment.

The Court: All right. Now, then, if you desire to introduce anything you may do it now before the argument on the motion.

Mr. Barshay: I offer in evidence, your Honor, the certificate of acquittal of the defendant Robert Sealfon under indictment number 3522c.

The Court: All right. It will be received and marked

—5—

in evidence.

(Marked Exhibit D-1 in evidence.)

Mr. Barshay: And I offer in evidence a correct copy of the minutes of the trial of the defendant Robert Sealfon under indictment—

The Court: The stenographic record of the trial?

Mr. Barshay: Yes. I got it from Mrs. Bergen, but I call your Honor's attention that in it is attached the summation and the Court's charge. Do you want that part of the record?

The Court: You can leave it in there, because I am pretty familiar with both of them. I don't think I will be biased or prejudiced by it.

(Marked Exhibit D-2 in evidence.)

The Court: Now, Mr. Gittleson.

Mr. Gittleson: May I, sir, on the preliminary motion, ask that the argument be taken by the stenographer?

The Court: Yes.

Mr. Gittleson: Now, if your Honor please, at the April term of this court, this defendant and others were indicted by five separate indictments, one of which is called, for the purpose of brevity, a conspiracy indictment, the others involving substantive offenses or the culmination of the alleged conspiracy. The period embraced in the conspiracy

indictment is precisely the period embraced in the substantive offenses; and when I shall address myself to the substantive offense indictments, I am presupposing that all of them are precisely alike, and when I talk about all of them I am applying my argument to the one at issue.

Now, sir, a trial was had in this court on December 11th, which concluded on December 19th adversely to the government. This defendant was acquitted.

. In order to understand the nature of the charge, it seems to me that we have to look at both indictments, conspiracy and the substantive offense indictments. You will find, sir, I think it is fair to say, that the underlying accusation in both is that this defendant and others conspired to defraud the government by means of presentation of false and fictitious invoices which were relied upon by the ration board over here in Lyndhurst and upon which sugar purchase certificates were issued in quantities and amount beyond what the defendants were entitled to receive.

Now, I am not discussing for the moment the question which has arisen in this case or will arise as to whether or not the product we bought was a ration-exempt product. We are neglecting that for the moment. But, confining myself exclusively to this question to determine the issues, you will see, sir, at once that the indictments are precisely

—7—

the same. I am familiar with the fact—

The Court: I am sorry to disagree with you, but I cannot see the identity between an indictment which charges conspiracy and an indictment which charges a substantive crime.

Mr. Gittleson: May I suggest to your Honor, sir—

The Court: There may be seeming identity of certain allegations, but the indictments are not identical.

Mr. Gittleson: May I suggest to your Honor, sir, that forms play no part in our determination; the fact that we call something a conspiracy, when it in reality was the trial of the substantive offense, then, sir, the latter prevails, irrespective of any label.

The Court: Except that the United States Supreme Court seems to disagree with the basic and fundamental contention which you make.

Mr. Gittleson: I think, sir, that the Supreme Court decisions are not at variance with my conclusion. It perhaps is that I fail to make myself as clear as I should have at the moment.

The Court: Well, perhaps you can convince me of that.

Mr. Gittleson: Now, sir, the government in the conspiracy case, and I call it that though I don't concede it to be a fact, proceeded to prove their case in this fashion, as

—8—

your Honor will recall better than I. They presented first the members of the ration board and through them their entire file which included every invoice, false, spurious and fictitious allegedly presented to them by Greenberg, I call him; and I say Greenberg including both Greenbergs and the Fresh Grown, the principal malefactor in the case. Every single invoice, I say, was introduced there in that case; and mind you, sir, the government did not claim that Sealfon had anything at all to do with the presentation of those claims, or, for that matter, the preparation of those particular invoices. And for all that appeared, every member of the ration board said that Sealfon was a complete stranger to him—"had never seen him"—his handwriting didn't appear in any particular invoices; and so far as they knew he was non-existent as an entity or a person.

The government didn't claim then, and will not claim today, and even if they do it will merely be an elaboration

which will fly in the face of what is meant by res adjudicata, but they didn't contend that Sealfon actually participated in the presentation of these false invoices; they sought to connect him in two ways. One, they said that Sealfon wrote a letter which the government contended was false in content, though the defendant contended it was true in content and the jury on that issue, determined that Seal-

—9—

fon's version was correct. That was the connecting factor, apart from the factor of Sealfon obtaining sugar after the sugar certificates were issued.

Well, sir, on the question of conspiracy, I am familar with the fact that you need not prove the consummation of the substantive offense to actually prove a conspiracy; but in this case it was definitely essential for the government to do it and they assumed the burden because it was an overt act on the part of Greenberg pertaining to an alleged conspiracy to defraud the government and that, fundamentally, sir, was the charge in the alleged conspiracy indictment and is the charge in the indictment at bar, to defraud the government, intentionally defraud the government.

Now, I said to your Honor, they sought to do it in one of two ways and I have disposed of the letter. The other alleged participation was charged to Sealfon in this fashion: They said, one, he should have been on notice that the sugar be obtained was beyond his normal quota. Well, of course, the jury said that is not so. But that question on that issue could only have arisen, sir, after the presentation of these fictitious invoices, the overt act; and it is common knowledge, of course, that it wasn't necessary and

—10—

isn't necessary for the government to prove that an alleged co-conspirator knows or is familiar with the activities of his fellow-conspirator and that is why it is, I assume,—and I don't think I am indulging in any far-fetched assumptions,—I think that is why it is the court allowed it in evidence. It was an overt act performed by one of the alleged co-conspirators to consummate the alleged conspiracy. And that is precisely what happened.

Then they said after he got the sugar, well, he changed his mode of payment. The jury said that had no significance at all. The verdict indicates that. And it said further that the fact that there were no written invoices meant absolutely nothing.

Now, that was the proof in the case. What is the government going to prove in this case? I know it may suggest itself to your Honor to say to us, "Well, how do we know what the proof is going to be in this case? How can I speculate?" Well, number one: Look at the indictment. What is the burden under the indictment now about to be tried that the government assumes? Primarily, sir, they charge that both defendants—didn't conspire, but did defraud the government; and they set forth twelve different invoices, all embraced in the conspiracy indictment, all produced in evidence on the conspiracy trial, and these particular invoices set forth that between the 19th of October,

—11—

1943 and the 6th of April 1944, all within the compass, I again repeat, of the conspiracy indictment, there were twelve different invoices presented. Now, they don't claim

that our friend Sealfon actually prepared these invoices. Well, your Honor will say, "How do you know that?" Well, I know it because these very invoices were introduced in evidence in the conspiracy case and these very invoices were before the jury and then, sir, there was no claim that Sealfon knew about it or Sealfon prepared them or counselled in their preparation or aided and abetted in it. So I take it, sir, from that that the government will still have to prove joint action on the part of Sealfon and Greenberg, all pertaining to a preconceived plan. But the jury has said that Sealfon had nothing to do with that; he knew nothing about it. That was the precise issue.

I know we don't have to have two people charged with a substantive crime join in its performance before either can be found guilty; we know that. But the peculiar facts in this case established in the conspiracy, indicate conclusively that the government of necessity relies upon one factor, the factor of joining both together as co-conspirators; and the jury, I repeat, sir, has said we are not guilty of that offense.

Aiding and abetting, sir, is precisely the same as a con-

spiracy. Well, sir, in order for us to be charged in this case with the commission of this crime, particularly when they said that we did not know of the existence of the invoices, and that is the proof in the conspiracy case—they would have to charge, sir, that Greenberg did something with our knowledge, with intent to defraud the government. How are they going to establish it? It must be a preconceived plan. You just cannot proceed and just give

it to the board and say, "You, Sealfon, because you got some of this sugar, actually defrauded the government."

The Court: If that were the only proof I would throw it out.

Mr. Gittleson: That's right, sir; that's precisely what I am arriving at. In this case, if they don't establish that Mr. Sealfon knew, one, when and where these certificates were prepared; two, they were intended to be presented to the government for the purpose of obtaining sugar replacement certificates; three, that they were false and he knew they were false at the time presented and the government relied on them. But, sir, that is out of this case, it has already been determined. The jury has said he has not been guilty.

Now, I say this to you very, very sincerely. The identity of the offense set forth in the conspiracy indictment is

precisely the offense identified in the substantive offense about to be tried. There is no difference at all, sir; and the test, as I understand it, is whether what is set out in the second indictment has been proved under the first and there could have been either a conviction or an acquittal. If that is so, sir, and where it does happen, as it did in this case, the second prosecution cannot be maintained. And there is a very good reason for that, sir. A prosecutor or a governmental agency that happens to be peeved as a result of some prosecution undertaken by it—for them to proceed with a second trial is a ready means of oppression if the issues had already been disposed of. And it makes no difference that they call it a conspiracy as opposed to a consummated offense or a substantive offense.

Now, the cases are very clear on the subject. I don't think there is any difficulty with it. On the question of res adjudicata, or that the government is concluded by the prior trial, the landmark case, as I recall,—you will find it, sir, in our brief as page 8; U. S. vs. Coffey. Now, there they set forth the doctrine in very explicit language, that it is no longer subject to question that the doctrine of res adjudicata applies, and they say that where the issues are once presented, that is the end of the case. Nobody can

take two bites out of the same cherry even though it be a governmental agency that attempts it.

You will find, sir, U. S. vs. Meyerson on the succeeding page. That discusses this matter very clearly. There is no question about the principle that we urge. It is clear. If the issues are the same, if the evidence is the same, a verdict concludes the proposition before the court.

Now, sir, it may be anticipated that the District Attorney may say, "Well, I didn't have all the proof on all the issues." That is no answer to make, sir. Judge Cardozo answered that discussion or that argument when he was the chief judge of our Supreme Court, of course later on a distinguished member of the United States Supreme Court. You will find that citation stated on the 11th page of the brief, Schuylkill Fuel Corporation. He says res adjudicata means "a judgment in one action is conclusive in a later one, not only as to matters actually litigated therein, but also as any that might have been litigated, when the two causes of action have such a measure of identity that a different judgment in the second would

destroy or impair rights or interests established by the first."

If he has additional testimony, sir, he should have offered it before.

—15—

The Court: Well, I will tell you frankly my difficulty. I start out with a recognition that the practice which seems to have grown up of indicting for both conspiracy and substantive offenses is capable of dangerous extension. That I realize. But after all, what was tried on the 11th of December was a charge of conspiracy and what the jury by its verdict determined was the Sealfon had not entered into common agreement with the Greenbergs and the Fresh Grown Company to violate the law. It doesn't seem to me that they went beyond that and determined any factual situation.

Now, the Supreme Court has time and again indicated that an acquittal on a charge of conspiracy is not such an example of res adjudicata as would prevent prosecution on the substantive offense which is involved in the conspiracy. I mean, that is definitely established.

I fail to see how any of the things that you allege the jury have determined were actually determined, because the only thing that they concluded was that there was no concert of action in the nature of a conspiracy, which is an agreement that might have been adduced from the facts produced. Now, the facts might all have been true and yet not warrant the inference, the logical inference that a conspiracy existed. That is my difficulty with your argument.

—16—

Mr. Gittleson: If your Honor please, perhaps the difficulty arises because you and I just don't interpret the same way what a conspiracy means. Our definitions do not coincide. But if a conspiracy—

The Court: Well, what is your definition of a conspiracy?

Mr. Gittleson: That a conspiracy is a corrupt agreement to do a legal act by unlawful means or to attain a criminal objective by lawful means, contingent upon a juncture of minds. Then, sir, I would say that whether you call it a conspiracy in this case, or whether you call this thing here the commission of a substantive offense, you are relegated to the fundamental proposition, number one: The government did not and does not claim that Sealfon actually did present, prepare or try to induce the government to issue sugar certificates based upon these fictitious or so-called fictitious invoices. They do say this: Greenberg did it, nobody else. That was the proof and they said in the conspiracy case, if you still want to call it that—

The Court: Well, I didn't call it that.

Mr. Gittleson: No, please don't misunderstand me.

The Court: No, the government called it that. The indictment, the Grand Jury called it that.

—17—

Mr. Gittleson: But we are not bound, sir, by any labels; we are bound by substance, not by form. The Grand Jury says—

The Court: I am willing to grant you that you are bound by substance, but after all, you cannot just simply cut loose from the ordinary significance of words; and if the Grand

Jury charges that certain men conspired and agreed corruptly, you cannot just simply brush that aside and say that doesn't constitute the substance of an accusation, because it does.

Mr. Gittleson: Well, sir, suppose the Grand Jury would say this: Suppose the Grand Jury would say that on the 16th of January I committed a robbery in that I killed my partner Hyman Barshay; does it mean because they say I committed a robbery and they set forth a murder accusation, that it follows they are correct?

The Court: You wouldn't even get to trial if they were stupidly and idiotically to frame such an indictment as that. But when it gets to the point of the trial, we presume it has been scrutinized by able and capable counsel—I indicate Mr. Barshay—and that whatever motions may be made directed to the futility of the indictment would be made. But when it gets to trial we must at least assume that there is at least some prima facie basis for the charge. It may not be dismissed cavalierly by saying, "Well, it is only a

charge."

Mr. Gittleson: Well, if your Honor please, it wouldn't make any difference, it wouldn't make the slightest difference in the first trial whether they call it a conspiracy or they charge a substantive offense.

The Court: Oh, yes, it would make a great difference.

Mr. Gittleson: Well, sir, if it did, the government didn't recognize it, because they introduced every piece of testimony thy are going to introduce in this case.

The Court: Well, Mr. Gittleson, you know perfectly well the instances in which a conspiracy can be proven by the production of a formal signed agreement or even by direct

evidence of a verbal agreement are very, very rare, and that it can ordinarily be proven only by circumstances from which a logical inference may be drawn. And therefore in the proof of a conspiracy, where there is no such direct evidence of a written agreement or direct testimony of a verbal agreement, the charging party, the government, must prove circumstances from which an inference may be drawn. Now, those circumstances may perfectly properly be proven and yet not warrant the inference.

Mr. Gittleson: Yes, sir.

The Court: There is the weakness, as I see it, of your argument.

—19—

Mr. Gittleson: Yes, sir, but I think we are not going far enough. Where they do it they do it to establish the issue and the issue in this case was the corrupt agreement, preconceived plan.

The Court: Which is the essence of a conspiracy, which, as you say, has been defined as an agreement to do something illegal by legal means or to do something legal by illegal means and the essence of the conspiracy is the corrupt agreement.

Now, the Supreme Court has indicated time and time again that the two crimes, the conspiracy to do something and the actual substantive offense are different crimes.

Mr. Gittleson: There isn't any doubt of that, sir. I do not contend there has been a merger here. That is not the contention at all; but the argument presently is not necessarily precluded by the fact that it is not a merger if the issues are precisely the same. Your Honor just intimated you have to prove your case, a conspiracy,

from circumstances. Of course you do. But where they do it, and they do it and say that in this case Mr. Greenberg is part of the conspiracy; he presented false claims and he got sugar—

The Court: Do you mean to say that the acquittal of Sealfon in the conspiracy case means that the jury found

as a matter of fact that Greenberg did not present these things?

Mr. Gittleson: Oh, no; Greenberg admitted his guilt.

The Court: Yes.

Mr. Gittleson: Res adjudicata only applies, in the first instance, to a situation where both parties are the same. Greenberg was not a party to that at all, so he couldn't come in and take advantage of that.

The Court: I didn't say that. I simply asked you if you contended that the verdict of the jury that Sealfon was not guilty meant that the proof of the fact—not Greenberg's admission, but the proof adduced at the trial, was disregarded by the jury and they didn't believe that Greenberg did it?

Mr. Gittleson: Oh, no, I think they believed it, but they said that Sealfon—

The Court: They simply said that that did not justify the drawing of a logical inference to the conclusion that Sealfon conspired. That's all the verdict meant, as I see it.

Mr. Gittleson: Well, of course we differ in that respect. We think it meant more than that. We think it meant in this case, only because of the peculiar facts involved, that Sealfon did not participate directly or in-

—21—

directly, whether as a result of a conspiracy or the result of aiding and abetting Greenberg in this particular crime.

The Court: No, as I conceive it, the verdict of the jury simply meant that no conspiracy existed. It did not in any way find an offense of some kind was not committed, because they were limited, and very sharply limited by the court's charge to the question of conspiracy.

Mr. Gittleson: Sir, in this district we had a like situation; it went to the Third Circuit. There was a case where a fellow was charged with robbery and conspiracy. The Government chose to try the robbery case.

The Court: And certain facts were definitely ascertained. I mean there was a verdict which made it inconsistent that he could have participated in any way.

Mr. Gittleson: I don't think the decision went that way.

The Court: I thought that was the effect of it.

Mr. Gittleson: The decision was that in view of the fact that the identity of the individual was excluded by the verdict of the jury in a conspiracy case they couldn't come in and then say there was a corrupt agreement, because in that case as this, the man didn't actually do the act. And that is this particular case.

—22—

Now, if you read the Myerson case, which we cite—you will find that on page 10—you will find there there were several defendants as well. You will find there that the mail fraud indictment was tried and one fellow Katz,

was acquitted and then on a later conspiracy indictment Judge Thacher, now sitting in our Court of Appeals said that the identity of the offense was such that the issues were determined. And in this particular case, as I see it, the government must go back to the fundamental problem of the corrupt agreement, because we just don't leap into existence by the mere presentation of these particular things, and even under that so-called conspiracy I think that in that particular case—and I think your Honor charged it, there had to be an intent on the part of Sealfon to actually agree with Greenberg to defraud the government; and that is our case here. That is this charge. The charge is that we did these things to defraud the government deliberately and wilfully and that is our position.

The Court: Well, my position is that I feel that the two crimes are not identical and that the determination of the conspiracy trial favorably to the defendant and unfavorably to the government does not make the matter res adjudicata. I shall deny your motion and you may have an exception.

[Which exception is hereby allowed and sealed accordingly —23—

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Barshay: Will your Honor permit me just for one moment or two—

The Court: No, I will only permit one person to argue on one phase of the matter.

Mr. Gittleson: Of course, the observation has been made, I think, but if not I would like to repeat it, that in this particular case of a series of indictments, Greenberg could

have very well been guilty of the conspiracy and at the same time guilty of the substantive offense.

The Court: Perfectly true.

Mr. Gittleson: But so far as Sealfon is concerned, we think that the jury has said otherwise.

The Court: That is our point of disagreement.

Mr. Gittleson: May we respectfully except?

The Court: I have allowed you an exception.

Mr. Hull: Now may we have the plea of not guilty restored?

Mr. Barshay: In connection with the plea in bar, will your Honor permit me to urge specifically the plea of former jeopardy and res adjudicata?

The Court: Yes, and I shall make the same ruling. The argument is practically the same as that advanced by Mr.

Gittleson.

Mr. Barshay: Yes, your Honor.

The Court: You may formally make that motion and I shall make the same ruling. You may have an exception to my ruling.

[Which exception is hereby allowed and sealed accordingly

THOMAS F. MEANEY
Sealed. U. S. D. J.]

Mr. Barshay: The defendant Robert Sealfon hereby interposes a plea in bar on the ground of former jeopardy in that in the April Term of 1945 the Grand Jury of the United States of America, impanelled in the District of New Jersey, returned and presented to this court an indictment which was filed on October 2, 1945 against this defendant

and others bearing the number 3522c, charging them jointly with the same acts as are charged in this indictment bearing number 2523c also filed in October, 1945, and which this defendant is now called upon to answer. Would your Honor permit me—

The Court: There is no question of the identity of the Sealfon in each indictment, is there, Mr. Hull?

Mr. Hull: What's that, sir?

The Court: There is no question of the identity of the Sealfon mentioned in each of these indictments?

Mr. Hull: One and the same.

—25—

The Court: One and the same. That is admitted, is it?

Mr. Barshay: Yes.

The Court: On the question of rule involved, I shall rule that the determination heretofore made by the Jury in the conspiracy case does not act as a bar to prosecution in the trial of the substantive indictment and that it is not res adjudicata and you may have exceptions to those rulings.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Mr. Barshay: Now may I offer in evidence copy of indictment 3522c which is the conspiracy indictment on which Robert Sealfon was acquitted.

The Court: We will take that as having been introduced for the purpose of the other motion as well as this.

(Marked Exhibit D-3 in evidence.)

Mr. Barshay: Just the typewritten portion of that. There are notes on that. I will give you a cleaner copy later. And may my plea also include that of res adjudicata?

The Court: Yes, I have ruled on that.

—26—

Mr. Hull: I wanted to make sure, your Honor, that the record now shows plea of not guilty.

The Court: Yes. By the way, there has been no plea entered.

Mr. Hull: You enter a plea of not guilty?

The Court: Is the defendant Sealfon here?

Mr. Barshay: Yes, he is.

The Court: All right. Plea of not guilty will be restored.

Mr. Hull: We would like, your Honor, with your permission, to select a jury in 3523c as to Robert Sealfon.

Testimony

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

3523c

UNITED STATES OF AMERICA,

—*v.*—

ROBERT SEALFON,

Defendant.

APPEARANCES:

For the United States of America:
VINCENT E. HULL, Esq.

For the Defendant:

HYMAN BARSHAY, Esq.,
ANTHONY CALANDRA, Esq.,
HARRY GITTELSON, Esq.

Tried before HON. THOMAS F. MEANEY, *Judge*, and a jury, at the Federal Building, Newark, N. J. on Tuesday, January 8, 1946.

THERESE CROSS BERGEN, C. S. R.
Official Reporter.

—A-2—

Mr. Hull: If the Court please, we move the trial of Robert Sealfon on indictment 3523c.

The Court: All right. You may call a jury.

(A jury was selected.)

Mr. Hull: Your Honor, may I suggest that we select one or two alternates.

The Court: All right. Select two alternates.

(Two alternates were selected.)

The Court: We will proceed with the trial of the other case, and that will mean that this jury will not be needed until—how long will your other case take?

Mr. Hull: Half a day, your Honor.

The Court: Well, we had better excuse you until tomorrow morning. Have you subpoenaed any witnesses for today?

Mr. Barshay: I have not.

The Court: Have you, Mr. Hull?

Mr. Hull: Well, yes, sir, but that doesn't matter.

The Court: All witnesses subpoenaed in the case of the United States of America against Robert Sealfon will be excused until tomorrow morning at ten o'clock when they will return without further subpoena. And ladies and gentlemen of the jury, you will be excused until tomorrow morning at ten o'clock, at which time you will be sworn in to function as jurors in this trial. Now, don't discuss this

case with anyone and do not permit anyone to discuss the case with you. That is very important. If anyone should try to discuss it with you, it then becomes your duty to inform the court.

You will now be excused until ten o'clock tomorrow morning.

(Adjourned to Wednesday, January 9, 1946 at 10 o'clock A. M.)

—1—

Newark, N. J., Wednesday, January 9, 1946.

(Resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: Are you ready, gentlemen?

Mr. Hull: Yes, sir.

Mr. Barshay: Yes, your Honor.

The Court: All right, you may swear the jury.

(The jury was sworn.)

The Court: Swear the alternates.

(The alternates were sworn.)

Mr. Hull: Judge Meaney, ladies and gentlemen of the jury, it will be my purpose in these opening remarks in behalf of the Government to tell you what the charge is that is made here against this defendant and then to outline to you the proof that will be offered by the Government in support of that charge; and so as to place before you the statutes that are involved, with the permission of the Court I want now to read in part from the statute that is directly involved and from another statute that pertains to this case.

May I do that, your Honor?

The Court: Yes.

Mr. Huli: Title 18, Section 72 of the United States Code, and this is the statute directly involved here, deals gen-

—2—

erally with the making and transmitting of forged, false and counterfeited documents therein referred to, and in part it says:

"Whoever shall utter or publish as true, or cause to be uttered or published as true, any false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited," violates this statute.

Title 18, Section 55 of the United States Code is known as the aiding and abetting statute and reads as follows:

"Whoever"—

Mr. Barshay: I respectfully object to it, your Honor, on the ground that the aiding and abetting statute, which counsel proposes to read to the jury now, has already been determined on a former trial between the Government of the United States and this defendant, resulting in the acquittal of this defendant in that trial, on that very theory.

The Court: Well, do you mean to say that the indictment which was tried charged him with aiding and abetting?

Mr. Barshay: The indictment that was tried, your Honor, charged him with conspiracy, which is—

—3—

The Court: Conspiracy, exactly; and the Congress of the United States has differentiated between the crime of

conspiracy and aiding and abetting, and the Supreme Court has upheld that distinction.

I think your objection is unfounded and I shall overrule your objection. You may have an exception.

Mr. Barshay: Thank you, sir.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Hull: This statute reads as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

I think you already realize from some of the questions that were asked of you that there was more than one defendant involved in this indictment, the Fresh Grown Preserve Corporation, Murray Greenberg and Leo Greenberg as well as Robert Sealfon; and I think you know also that the only one you have to deal with here is Robert Sealfon, because as to the others this case has been disposed of.

The indictment is in twelve counts and charges a sep-

4

arate violation of the statute that I referred to in each of

the twelve counts, but nevertheless they are all similar, and the proof that you will receive here will be parallel with respect to each of the counts. They are different because they are violations alleged to have taken place on different dates, beginning on October the 19th, 1943, in the first count, and in the last count a date in April 1944.

In order to acquaint you with the charge I am going to read part of the first count of the indictment. The first paragraph thereof alleges the establishment of a ration board at Rutherford, New Jersey, known as the Local War Price & Rationing Board, covering the area in Lyndhurst, New Jersey. I shall not read that paragraph at length.

The second paragraph alleges the existence as a corporation of the Fresh Grown Preserve Company; and in the third count, or rather in the third paragraph of the first count, we find the following:

"That on or about the 3rd day of November, in the year 1943, at Rutherford, in the County of Bergen and the State and District of New Jersey and within the jurisdiction of this Court, Fresh Grown Preserve Corp., N. J., a body corporate, Murray Greenberg, Leo Greenberg and Robert Sealfon (hereinafter in this indictment sometimes called and referred to as the defendants), for the purpose

—5—

of defrauding the United States and to induce the said Board to issue to the said corporation sugar purchase certificates to replace sugar, did wilfully, knowingly, unlawfully and feloniously utter and publish as true and cause to be uttered and published as true to and upon the said

Board, a certain false, forged and counterfeited writing purporting to be a true and correct copy of an invoice for goods and materials sold and delivered by the said corporation to Sero Syrup Co. (a trade name adopted and used by the said Robert Sealfon in conducting his business), for and for the use of the Brooklyn Navy Yard, and the Navy Yard, Navy Department, Brooklyn, New York, and of the following tenor and effect, to wit,".

And then the particular invoice is set forth in the charge.

And continuing:

"which said false, forged and counterfeited writing was false, forged and counterfeited in this, that the said corporation did not on or as of the 1st day of October, 1943," which was the date inserted in the invoice,—"sell and deliver to the said Sero Syrup Co., 6,000 gallons of vanilla syrup Co., 6,000 gallons of vanilla syrup for or for the uses of the said Brooklyn Navy Yard or for the Navy Yard, Navy Department, Brooklyn, New York, or elsewhere, or for or for the use of any exempt agency, but did sell and

—6—

deliver to the said Robert Sealfon for his own use and benefit the said 6,000 gallons, the said writing being entirely false, forged and counterfeited and representing no sale or delivery of sugar products to any exempt agency, the said defendants knowing the same to be false, forged and counterfeited"—

That, ladies and gentlemen, is the charge as stated in the first count, and as I have said, it is identical with respect to each of the other counts except as to the date and as to the particular information contained in the invoice.

Now, the Government in this case is going to present proof to you of this charge on the part of Robert Sealfon as we consider in substance which is overwhelming and conclusive beyond any reasonable doubt. We are going to show you first of all how the system of sugar rationing operated with respect to what was called a replacement program, and you will see from the evidence as to that, that industrial users of sugar, of which Sealfon was one, and of which the Fresh Grown Preserve Corporation was one, were given a basic quota, and that began in the year of 1942 and was predicated upon the amount of normal business which was operated by such industrial user in the year of 1941 and it constituted a certain percentage of that 1941 normal business. That percentage varied from time

to time. You will see what the basic quota was for both Sealfon and for the Fresh Grown Preserve Company.

And it will be brought out further that the purpose of the replacement program was to provide a replacement of sugar used out of the basic quota for such producers or processors as may have made deliveries of syrup or sugar or any product containing sugar, in this case we will talk about syrup, to exempt agencies within the United States, or deliveries for foreign export. And it was intended by the regulations that were adopted, that if such deliveries were made to exempt agencies, the industrial user would not suffer by having to use out of the quantity which he received to carry on his normal business, as I have described.

We will then show you that sometime early in 1943 through the office of Kraemer & Company, a sugar broker

office in New York City, a contact was made between Murray Greenberg or Leo Greenberg or both, who were the officers of the Fresh Grown Preserve Company, and Robert Sealfon, and most of the transactions in so far as the Kraemer Company were concerned were handled in this case by a man who was employed there named Sanford Doctors, an employee of Kraemer—

Mr. Barshay: I beg your Honor's pardon. May I inter-

—8—

pose an objection to this line of opening, too, sir, on the ground that the matter that the Government counsel speaks of now, he is precluded from doing so by reason of the fact that that issue and that testimony was presented upon the former trial, because the Government counsel deemed it essential, material and relevant, and that issue was determined in favor of the defendant and against the Government by the defendant's acquittal, and thus he is precluded from litigating the matter anew. And I should like to press that objection, your Honor, not to interfere with my adversary—

The Court: All right, all right.

Mr. Barshay: —or to appear annoying, throughout the entire opening. Will you deem—

The Court: All right; I shall overrule your objection. You may have an exception.

Mr. Barshay: To any phase of it and to every phase of it, without repeating it in detail?

The Court: All right. I will overrule your objection. You may have an exception.

Mr. Barshay: Thank you.

The Court: Because I don't conceive that the determination of the conspiracy trial had the effect which you seem to claim.

Mr. Barshay: Later on, your Honor, I will ask permission to argue the point in the absence of the jury.

—9—

The Court: All right.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Hull: After the contact was made to which I have referred, some deliveries of syrup were made by the Fresh Grown Preserve Company to Sealfon, and then there came a time, towards the end of February, or sometime in February 1943 when Murray Greenberg, or one of the Greenbergs, approached Sanford Doctors with a suggestion that he go to Robert Sealfon to obtain a certain letter, and in that conversation Greenberg told Doctors that if he—

Mr. Barshay: I object to that. He couldn't testify to that under any condition, on this theory.

The Court: Well, I don't know what he can testify to and you have had your objection to the opening on that line, and I think that you might withhold objection at this time until something which is entirely different to the line of objection that you have made is attempted to be presented by the Prosecutor.

Mr. Barshay: This is a separate objection, your Honor, that has no bearing on my prior one. He is relating—

The Court: What is your objection now?

—10—

Mr. Barshay: He is relating a conversation between Greenberg and young Doctors—

The Court: Well,—

Mr. Barshay: —not in the presence of Sealfon.

The Court: All right; if he attempts to prove it, you may object to it, but I don't know that—he hasn't said that it was a conversation not in the presence of Sealfon; you are presuming that.

Mr. Barshay: Well, maybe because, sir, I anticipate.

The Court: You are presuming it, and there is nothing that the United States Attorney has said which would indicate it.

You may proceed, Mr. Hull.

Mr. Hull: We will show you a conversation took place between Sanford Doctors and Murray Greenberg and that as a result of that conversation Sanford Doctors went and talked to Robert Sealfon and told him Murray Greenberg had proposed that if Sealfon would write a letter listing the names of some customers of his, and if there were any exempt agencies to include those, that he, Greenberg, and the Fresh Grown Preserve Company, would be able to sell syrup to Sealfon in larger quantities. We will give you the full conversation that took place between Doctors and Sealfon; and we will then prove that a letter was written. We will also prove that before it was written there was

—11—

conversation between Murray Greenberg and Robert Sealfon in which both persons perfectly well understood, as you will see from the testimony of the conversation, that the

letter was going to be fictitious; because Sealfon was told by Murray Greenberg that even though he was not dealing with exempt agencies, that if he would indicate in that letter that he was so dealing, that letter would be used by Greenberg in order to get more sugar from the ration board.

And we will also bring evidence to show you that Robert Sealfon knew from that conversation the way in which it was going to be used, and knew that Murray Greenberg and the Fresh Grown Preserve Company were going to prepare false invoices, using the names contained in that letter, to submit to the Rutherford Ration Board, attached to applications for replacement of sugar, and to make it appear to the Rutherford Rationing Board that sales of syrup were being made by Robert Sealfon to the Brooklyn Navy Yard, whereas both of them knew that that was not true.

A letter was written and was dated March the 10th—or, rather, the 3rd—and it was forwarded to the Fresh Grown Preserve Company by Robert Sealfon, contained in another letter dated March the 10th, and in that other letter dated March the 10th there was also a contract which had

been prepared between the two of them covering these transactions and calling for deliveries of specified amounts of vanilla syrup.

Then we will show you that beginning on February the 17th, 1943, some few weeks before the letter in question was written, Robert Sealfon began a course of dealing with the National Biscuit Company in New York, in which

he had arranged and agreed to deliver vanilla syrup to them.

You will next see that on March the 11th, the same day that the letter was received at the Fresh Grown Preserve Company, an invoice was submitted to the Board by the Fresh Grown Preserve Company, showing a purported delivery of syrup on the Sero account to the Brooklyn Navy Yard, and that that was dated back to sometime, I think, in January, 1943. In other words, the application was dated March 11th but the invoice was dated back, purporting to show a delivery to the Brooklyn Navy Yard some weeks before.

After that, and up until April the 11th, 1944, there were nearly a hundred—no, there were 56 applications filed by the Fresh Grown Preserve Company with the Rutherford Rationing Board containing one of the names listed in that letter, the Brooklyn Navy Yard, and attached to those 56 applications there were 596 invoices with the name Brook-

—13—

lyn Navy Yard.

On those applications 131 certificates, replacement certificates, were issued by the Board for a total amount of over 21,000,000 pounds of sugar.

We will show you that all of those certificates except one were presented by the Fresh Grown Preserve Company to one of two refineries, the National Refinery and another one, and that full delivery of that entire amount of sugar was made by the refineries to the Fresh Grown Preserve Company.

We will also show you that over 9,000,000 pounds of that sugar was put into syrup, vanilla syrup, by the Fresh

Grown Preserve Company and sold to Robert Sealfon, and that 98 percent of that amount of more than 9,000,000 pounds of sugar was delivered by Robert Sealfon to the National Biscuit Company, that the other two percent was delivered to two or three other isolated private customers of Sealfon, and that none of it ever went to the Brooklyn Navy Yard.

Now, you appreciate from what I have said about the counts of the indictment that the charges contained in the twelve counts do not involve all of that sugar. There is one invoice attached or rather set forth in each count, and in each instance the twelve invoices attached to the twelve separate counts call for syrup with a sugar content of

something over 37,000 pounds, and the reason I mention that is because you are going to deal with the specific charge as contained in the indictment, and we are introducing the other evidence to show similar conduct right through the period of time that I have indicated, to help you in determining the question of this charge as it relates to the specific invoices included in the indictment.

In each of the twelve applications relating to the twelve separate counts of the indictment there is more than one invoice. There are probably about a dozen attached to each application, including the one that is contained in the respective count of the indictment.

You will see that over 6,000,000 pounds of the 9,000,000 and more that Sealfon obtained in this way came out of the twelve applications that we are concerned with here, although the direct charge relates to the specific invoice set forth in the indictment.

That, I think, gives you a general outline of the Government's case, and there is just one more thing that I will take occasion now to tell you about. We will present testimony that as a further inducement to Sealfon to participate in this case, and by proposal of Sealfon himself, he was paid two cents a pound by Murray Greenberg and the Fresh Grown Preserve Company for every single bit

—15—

of sugar that the Fresh Grown Preserve Company obtained from the Rutherford Rationing Board in following out the system of using the names contained in a letter so furnished.

I think that that gives you a picture of the case. I ask you to listen closely to the evidence as we present it, and I say to you again that I think that the evidence you are going to hear will be overwhelming and conclusive.

Mr. Barshay: Will your Honor permit me to argue a question of law in the absence of the jury?

The Court: Yes, the jury will be excused while counsel makes a motion and presents the legal argument to support it.

From time to time, whenever counsel has a motion of this type, I shall excuse you, because it is concerned only with the law involved, and I have to pass on that and it might be confusing to you were you to be involved in it by hearing it. So it is not significant of anything at all that you are excused but simply for your protection as well as the protection of the defendant. You may be excused temporarily.

(The jury withdrew.)

Mr. Barshay: If your Honor pleases, on the opening of the Government counsel I move to dismiss this indictment on the ground that on the facts he said he would

—16—

present a prior judgment of acquittal was conclusive and a complete bar to this prosecution, on the theory of res judicata.

The Court: The—

Mr. Barshay: Excuse me, sir.

The Court: That's all right; go ahead.

Mr. Barshay: I beg your pardon, Judge. May I proceed?

The evidence he spoke of is substantially identical with the evidence presented on the indictment No. 3522c, which on the 19th of December, 1945, resulted in an acquittal of this defendant Sealfon.

I am thoroughly familiar and in accord with your Honor that a conspiracy and a substantive indictment can be tried because it is quite conceivable that the Greenbergs could be guilty of the substantive offense. The fact that they pleaded guilty and the fact that the theory is presented by the Government on the last trial and here in his opening that Greenberg presented the certificate at the ration board by himself and not with the aid, physical aid I mean, sir, of Robert Sealfon—that could make Greenberg guilty of the substantive count and it could also make them guilty of a conspiracy or an agreement to do it. At the same time it is quite conceivable, sir, that Sealfon could be guilty of the conspiracy, if the jury so found, and not be guilty of

—17—

the substantive count. In other words, a man can conspire, sir, to commit a crime and not actually commit the crime, or aid and abet in the commission of the crime, while his co-defendant may be guilty of both conspiring with the man to commit the crime and then by himself, without any aiding or abetting, counsel or advice from his associate, commit the crime all by himself.

That's the situation, the latter one, that was presented both on the last trial, no matter what you call it, and that is the situation as Mr. Hull outlined to the Government he will prove in this case.

Now, Sealfon could only be guilty if the Government proves that he had knowledge of the scheme, he consented to the scheme, he intended to help Greenberg in th filing of those invoices. Unfortunately for the Government, that issue was presented, call it what you will, conspiracy or aiding and abetting, or counseling or advising; the Government presented proof. If it failed to present its proof, it was obligated to do so, and its failure cannot at this time be made an excuse to create a new theory upon which the matter can be re-litigated. That opportunity was available for the Government when they called Greenberg to the stand.

Yesterday there was cited to your Honor the Schuylkill

—18—

case, in which Judge Cardozo wrote an opinion on the direct point. If the Government had the opportunity to do so and didn't avail itself of that opportunity, it is not

the fault of the defendant, nor can that be an out for the Government for failure to do so.

The Court: Well, it seems to me, Mr. Barshay, that if your contention is true, the Supreme Court doesn't know what it is talking about when it says that there can be a prosecution for conspiracy and a prosecution for commission of a substantive offense arising out of the same circumstances; because once a conspiracy case is tried, the Government could prove all of the facts, and the fact that they didn't prove it, it seems to me, in your case, if the conspiracy charge were tried first, would forever bar any trial of a substantive offense.

Mr. Barshay: No. I said, your Honor, I agree that one conspiracy trial does not bar a substantive trial; I admit that; that is the general rule.

The Court: Yes.

Mr. Barshay: With which I find no fault. But the facts in this case are peculiar, because the Government has chosen, it was up to itself to choose, it could have proceeded with the conspiracy trial and proven a corrupt agreement between Sealfon and the Greenbergs and proved an overt act, but—

—19—

The Court: Yes, but a corrupt agreement is not the same as aiding and abetting. Aiding and abetting has been denominated a specific crime by the Congress of the United States.

Mr. Barshay: But, your Honor,—

The Court: A crime which is different, separate and apart from the crime of conspiracy; and that distinction has been recognized by the Supreme Court; and a man may

be guilty of aiding and abetting the commission of a crime and still not be a conspirator, or he may be a conspirator and still not be an aider and abettor.

—20—

Your Honor, we are not indicted under that section, that is the point. We are indicted under section 2. We are not charged with the other sections which Mr. Hull directed to the jury.

The Court: No, but the other section makes the aider and abettor a principal so that he may be indicted as a principal even though as a matter of fact he may be what, under the common law, was known as an aider and abettor and under the statute. But the Congress has seen fit to pass a law which has received judicial interpretation, that an aider and abettor is guilty as a principal and may be indicted as a principal.

Mr. Barshay: Then we should have been charged with that section, your Honor.

The Court: Oh, no.

Mr. Barshay: Together with section 72.

The Court: Oh, no; that is simply a declaration that a person who aids and abets may be indicted as a principal and he is indicted as a principal, not as an aider and abettor.

Mr. Barshay: That is true, your Honor, but call what you will an aider and abettor, the Government undertook to prove in the last case, the conspiracy trial, that this man Seaifon aided and abetted, even though it called him a conspirator.

—21—

The Court: No, it attempted to prove that he conspired

with this other group to commit the crime. Now, that is a different offense from aiding and abetting.

Mr. Barshay: Your Honor, didn't he do it in identically the manner which he outlined in the opening?

The Court: I don't care how he did it, but as I indicated yesterday, the jury, by a determination of not guilty so far as Sealfon was concerned then, simply found that he was not guilty of the charge of conspiracy; and there is no way in which we can read the jury's mind and determine whether it believed there was a failure of proof of the existence of a conspiracy or a failure of proof of the commission of the overt act. There were several things which the Government attempted to prove which were not mentioned as overt acts. The Government brought forth, for instance, the fact that somebody had acted as a go-between; the jury may not have believed that. I don't know what they believed. All I know is that out of an involved series of transactions they determined that there was no conspiracy. Now, whether that was because of failure of proof of the existence of the corrupt agreement or whether it was the failure of proof of any particular feature that the Government attempted to prove, I don't know and there is no way of determining from the jury's verdict.

—22—

Mr. Barshay. May I urge, your Honor, that you charged the jury that there are two ways to prove conspiracy: (1) By corrupt agreement; and you said quite properly that rarely, if ever, is the Government in a position to give proof of any agreement as you and I understand an agreement to be.

The Court: Well, by direct proof of an oral concert.

Mr. Barshay: That's right, an understanding. And then you suggested to the jury very properly and correctly, that the other way and the way which the Government chose, is by proof of the acts themselves, whether listed as overt acts or not.

The Court: No, no; proof of circumstances from which the jury might logically infer the existence of a conspiracy.

Mr. Barshay. That's right, sir. And so on that theory the Government proceeded to prove: (1) The intermediary testimony of Doctors, then the consummation of this alleged conspiracy by the filing of the actual invoices at the Rutherford Board by Greenberg himself and alone, from which—being one of the circumstances—the jury was given to infer whether or not a corrupt agreement existed. So that—

The Court: But I don't know what the jury believed of the various elements adduced. All I know is that they did

not believe that there was sufficient proof of circumstances from which a logical inference might be drawn that a conspiracy exists. Now, according to your theory, as I see it—I may misapprehend it—once a conspiracy is attempted to be proved by circumstantial evidence the Government would be forever barred from prosecuting on the substantive count.

Mr. Barshay: If the Government chooses, your Honor, to act as it did in this case, I say justice and the law preclude them from a subsequent prosecution to avoid oppression.

The Court: No.

Mr. Barshay. Because if it weren't so, your Honor—

The Court: But the Supreme Court, as you have indicated yourself, and as I know, has referred to the growing tendency to indict for both substantive offenses and conspiracy arising out of the same transaction, and they say that that may be a weapon of oppression, but they also say that it is within the purview of the law. It chooses to discourage the practice, but it does not say that there may not be prosecution on a charge of conspiracy and on a charge of violation of the substantive law arising out of the same facts.

Mr. Barshay: Yes, your Honor. Do you discard the theory of res adjudicata in this case?

—24—

The Court: No, I certainly do not, definitely not.

Mr. Barshay: Then I ask your Honor—

The Court: But I say that you have no way of indicating to me that the jury did adjudicate the thing that you think it adjudicated. I say that it simply said that there was no conspiracy, and I don't know whether they arrived at that conclusion because of a failure to prove the existence of a conspiracy or because of a failure to prove commission of the act alleged. I don't know, and there is no way in which we can determine.

Mr. Barshay: Must we not, your Honor, draw the reasonable and logical conclusion that at least the issues which were presented to that jury to decide were decided against the Government?

The Court: Not all of them, no. There is no way in which to go in the minds of the jury and find out what they did determine except that there was no conspiracy. Now

why it arrived at that determination, whether it was because of failure of proof of any of the overt acts or failure of proof of the existence of the conspiracy I don't know.

Mr. Barshay: Well, Judge, if we are merely going to take their conclusion that they acquitted, without setting forth—

The Court: You will remember the De Angelo case which

you cited?

Mr. Barshay: Yes.

The Court: There De Angelo had been tried on the substantive charge and the only fact in issue was whether De Angelo was present at the alleged ground. The jury found certain individuals guilty and found him not guilty. Then later in the conspiracy charge the Government attempted to prove that he was present. Now that was res adjudicata.

Mr. Barshay: That's correct.

The Court: That definitely and flatly had been determined by a jury. But in this case, in the conspiracy case, I don't know what the jury believed except that there was no conspiracy in which Sealfon participated.

Mr. Barshay: Can't we reasonably say, sir—

The Court: We can speculate, but we cannot logically be compelled to a certain conclusion that the jury found that all of these matters adduced by the Government were not true.

Mr. Barshay: Can't we reasonably assume, sir, that all the issues presented—

The Court: We must be logically compelled and legally compelled to conclude, not assume anything.

Mr. Barshay. Can't we be logically compelled to draw the only conclusion that at least the issues as presented

—26—

in the indictment and supported by proof, were presented to the jury and each issue as presented to that jury was by its verdict decided in favor of the defendant?

The Court: No. If that were so and you were to take Justice Cardozo's opinion in conjunction with it, then the Supreme Court would have ruled futilely when it said you could have a trial on a charge of conspiracy and a trial on a charge of violation of the substantive act, because the Government was in a position where it could have proven all of these things and didn't.

Mr. Barshay: You see, your Honor, you and I agree on the general principle of law.

The Court: We agree on the principle; I mean as far as that is concerned I think that the De Angelo case was soundly decided. But there there is no other conclusion that can be drawn from the verdict of the jury except that it found that De Angelo was not present.

Mr. Barshay: Your Honor, I can distinguish the De Angelo case; I can conceive where a man could be absolutely not guilty of the substantive crime of robbery because he may have been in Chicago, but he could be guilty of the conspiracy for the commission of that crime by proof that either through long distance 'phone, letter, or personal contact he was a conspirator or an aider and abettor.

—27—

The Court: No, no, no, no, no. You see, you are confusing conspiracy and aiding and abetting.

Mr. Barshay: Call it what you will—

The Court: Oh, we won't call it; Congress called it. Congress said there is a crime of conspiracy and Congress said there is a crime of aiding and abetting, and it did not merge them; it did not identify them each with the other. It said they are two separate offenses. What you are trying to do as I see it is to say that if a man is not a conspirator he cannot be an aider and abettor.

Mr. Barshay: I am not exactly trying to say that. Perhaps I don't make myself clear, but I say the definition of each person's act must be determined by the acts themselves. In other words, as a conspirator I can do things as I can as an aider and abettor, is that right, your Honor?

The Court: Well, you argue.

Mr. Barshay: Yes, I can do that. I could be guilty of both.

The Court: You can be guilty of both, you say, conspiring and aiding and abetting.

Mr. Barshay: I could be guilty of being a conspirator and I could be guilty of being a principal.

The Court: You can be guilty of aiding and abetting because Congress has said there is the crime of conspiracy

and there is the crime of aiding and abetting and nowhere does it indicate and nowhere can I find out that the Supreme Court says that you may not be at one and the same time a conspirator and an aider and abettor, that is under the circumstances arising out of the same facts.

Mr. Barshay: But if the facts establish me either as an aider and abettor, because they are the same acts, your

Honor, then I say a determination that I am one or the other bars a subsequent prosecution with respect to the other.

The Court: No, I don't think so.

Mr. Barshay: That is my position.

The Court: That is exactly what I say. You say that the crimes are mutually exclusive; you cannot conspire to commit a crime and aid and abet.

Mr. Barshay: Your Honor, did you look at the Meyerson case which I called to your attention?

The Court: Yes, I did.

Mr. Barshay: In which Judge Thacher wrote an opinion?

The Court: Yes, I read Judge Thacher's opinion and I also read an opinion of one of your other New York judges, Judge Gavin, I think, with which I completely disagree. But I am in accord with what I believe to be the expression of the Circuit Court of Appeals of the Third Circuit in so far as it covers this particular phase of the question, and

also with the Supreme Court of the United States which definitely is binding.

I shall deny your motion. You may have an exception.

Mr. Barshay: I respectfully ask an exception, your Honor.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Barshay: And not to be a sort of annoyer of the jury are you going to permit me, sir, to argue these points to the jury and elaborate upon them?

The Court: No, I will not permit you to argue the fact that there has been a determination of these facts because I am ruling as a matter of law that there was no such determination.

Mr. Barshay: And you won't permit me then—

The Court: No. Maybe I am presuming something; what do you want to argue?

Mr. Barshay: First I want to make an objection to each person's testimony as he takes the stand.

The Court: You may make that objection.

Mr. Barshay: On the same theory as I have before; that is to preserve the record. Believe me, sir, I am sincere in that.

The Court: Yes, you may make that objection.

—30—

Mr. Barshay: Second I should like to be able subsequently, and even at the opening, to object to the jury that the same witnesses testified upon issues which are present before them now and a determination was made in favor of the defendant by his acquittal.

The Court: Well, I have just ruled that I don't agree with you and I think I would rather stultify myself if I said "that isn't true but you can tell the jury it is true".

Mr. Barshay: No, no, not tell them it is true but leave it to them to decide.

The Court: They are not determining that.

Mr. Barshay: I will take an exception to that throughout the entire case and I will limit myself to the objection.

The Court: Yes. You may make those objections as each person proceeds to testify and in order that as little confusion may be caused the jury as possible I shall rule de-

pending on the testimony of each person giving the same reasons as heretofore alleged and those reasons will be the reasons which I have given you and which you have argued.

Anything further now before we recall the jury?

Mr. Barshay: Would your Honor permit me to reserve my opening until the end of the Government's case and

—31—

then may I refer to it?

The Court: I think you had better not even refer to it because then it will just be in the normal course of the thing. I think it better from your standpoint that there is no reference to that. All right, you may recall the jury.

(Proceedings resumed in presence of the jury.)

CHARLES W. QUICK, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Quick, what is your position with the United States Government? A. I am chief counsel Sugar Ration Division, Office of Price Administration, Washington, D. C.

Q. How long have you occupied that position? A. For three days, since—

The Court: Congratulations to the Government.

A. (Continued) I served prior to that as chief counsel, the Sugar Rationing Branch of the Office of Price Administration for approximately a year and prior to that time and

part of the same time chief counsel in charge of legal drafting before the Food Ration Division and since December 1, 1943, as chief of the drafting unit of the Office of Price Administration.

Q. Aside from your connection with the Government what is your experience in the law? A. I graduated from Harvard

—32—

Law School in 1938. I served on the staff of the Harvard Law School as research assistant in construction of Federal Statutes and particularly the Bankruptcy Act in 1939. In 1940 I practiced law in the City of Cleveland and in 1941 I was Professor of Law in charge of teaching construction of Federal Statutes, North Carolina College in Durham, North Carolina.

Q. You went from there into Government service? A. Yes, sir.

Q. In any of your official capacities what have you had to do with the drafting of O. P. A. regulations? A. Since December 2, 1943, I have supervised or personally drafted every regulation covering the rationing of sugar and personally drafted all revisions to the sugar rationing regulations.

Q. I take it that that includes the regulations relating to the replacement of sugar? A. Yes, sir.

Q. Will you tell us in a general way, Mrs. Quick, if you please, what the regulations provided with respect to basic quotas for industrial users and then what they provided concerning replacement? A. The sugar rationing regulations became effective on April 20, 1942. They provided that all industrial users, those persons who used sugar in

the making of a product other than sugar, such as the use of sugar to make jams, or to make candy, or to make ice

—33—

cream, all such persons should register at the local board on April 28th or April 29th. The section providing for registration was Section 1407.83 of the Sugar Rationing Regulations. It provided further that all such industrial users must state the amount of sugar that they have in their possession, Section 1407.84. And they provided further that he must establish on O. P. A. Form R-310 the amount of sugar he used in 1941. That was under Section 1407.85. They provided that he state his use during each month in 1941 excluding, however, the amount of sugar he used in products which he delivered to the Army, the Navy, the Coast Guard, the U. S. Maritime Commission, the Civil Aeronautics Board, the Commission for the Development of Aeronautics and the Office of Scientific Development and Research and the Panama Canal. It would exclude those from the amounts he used in 1941.

There were other provisions which covered the fellow who did not use sugar during every month in 1941, but the majority of users, of course, had a full yearly use of sugar during 1941.

It provided in Section 1407.86 that such industrial user would come in and get a percentage of that use; that is, if he used ten thousand pounds of sugar during a certain period in 1941, for the identical period during 1942 he would get 70 per cent of that amount of sugar to make his

—34—

products.

At first it provided that he had to come in every month to get this certificate from the Board. Later on by Amendment 3 it provided that he would come in at the end of each two months period. Amendment 3 was effective on June 19, 1942.

Now, we excluded from the base deliveries to the Army and the Navy and these other agencies I have mentioned because we did not want to restrict the amount of sugar containing products that the Army and Navy and Coast Guard and these other agencies would acquire, because in the allocation of sugar by the Allocation Board which consisted of the Secretary of Agriculture, the head of the War Production Board and the head of the O. P. A., there were set up separate categories. So much sugar was allocated from the world supply, that part of the world supply which was designated for use in the United States, to civilian production, and so much to the Armed Forces and so much for export. We also excluded sugar destined for export because under Directive 1-E issued by the War Production Board on April 20, 1942, the Office of Price Administration had no authority over the export of sugar and the export of sugar-containing products was properly placed under the State Department and several other agencies in the Government. This allocation for the Armed Services, therefore,

would be used in taking care of replacements of sugar in products delivered to them. Now, we took care of this replacement of sugar in products to these various agencies by four sections in the order. First, 1407.183 provided that if you delivered sugar to any of these agencies, sugar itself,

you could go to your local board and get certificates to cover the amount of sugar you delivered so that you could continue with your normal civilian delivery. Section 1407.84 provided that if you delivered sugar-containing products to the Army and the Navy and these other agencies that I have named, that you would also go to your local ration board and obtain certificates for the amount of sugar which you delivered. The amount of those certificates issued, of course, would be then deducted from the allocation for the Army. The provision 183-B also provided that if you delivered sugar in products which were destined for export you may also apply. Now, later on—well, in the application of a replacement you applied on Form R-315 and you stated the name of the particular agency to which you delivered the sugar and the products which were delivered and the time in which it was delivered and you would be entitled to replacement of the products, or the sugar in the products which you had already delivered.

Amendment 12 effective September 23d provided in Section 1407.185 that you could get such replacement even though you did not directly deliver the sugar to the exempt

agency. That is, certain manufacturers would supply chocolate bars to be delivered to another manufacturer who would place them in ration kits and that second manufacturer would have the coontract with the Army and the Navy and therefore we provided that if you delivered to a manufacturer who had a contract with the Army and the Navy you would be able to apply and get replacements of those products.

On July 1, 1943 we adopted another amendment. It was called Amendment 70 to Rationing Order #3, and that Amendment 70 provided that beginning August 1 you could not apply at your local board for the replacement of sugar in products which you delivered to any agency but must instead apply to the particular agency and we authorized the Army and the Navy and the various exempt agencies to themselves pass upon those applications for replacement and give out certificates.

Q. Mr. Quick, before July 1 while the boards were still designated to handle these R-315 applications what provision was there with respect to proof that should be furnished? A. In the original sugar rationing regulation it was provided that you made your deliveries to the Army or the Navy or any other agency as the case may be, and then you gave evidence which substantiated the delivery including a receipt from those agencies. If you did not have a receipt at that time you would still get replacements

but you would be required to bring that receipt in as soon as you did obtain it. Amendment 7, effective August 8, 1942 loosened that system somewhat and provided that receipts were no longer necessary as long as you produced evidence, any evidence which the board believed, they could give that replacement.

Q. Was that supposed to be evidence of a prior sale and delivery? A. That was evidence that you had in fact delivered. Now, no replacement was to be made at any time until the provisions of Amendment 70 were effective prior to the delivery; that is, you got replacement only under Rationing Order 3. Now Amendment 70 made addi-

tional provisions. It provided that you could apply to the Army and the Navy and they would give you the checks which you were to cash in or the certificates or even the sugar and allow you to make the product in advance which you weren't allowed to do.

Q. Was there any way at the time these boards were handling the applications whereby you could get sugar in anticipation of delivery? A. There was no way in which you might obtain sugar in anticipation of a Government contract.

Q. Were there some instances in which Government contracts were issued—I would like to distinguish between isolated sales, for instance, by industrial users and a long term Government contract, if there was any such thing.

—38—

A. There was no distinction between the two. The long term Government contracts became very pressing in 1943 and that was one of the reasons among others that we took care of the situation by Amendment 70 and the enactment of General Ration Order 11 permitting—

Q. Then at all times there had to be a delivery prior to the date of the application for replacement? A. Yes, sir.

Q. Now, you have talked about such a thing as an indirect application. I think, for instance, you said where the user, the industrial user was not going to deliver directly to the exempt agency. Now in that type of case was it necessary to specify in the application exactly what the situation was? A. In that case it was necessary to tell the products that were being delivered indirectly. If the person had a contract with the Government, to whom you delivered the product and that it was rationed foods

and the amounts that were used and the date of delivery on the application on R-315.

Q. Was the United States Navy an exempt agency within these regulations? A. Yes, sir.

Q. Was the Brooklyn Navy Yard such exempt agency? A. The Brooklyn Navy Yard, yes, sir.

Q. Do you have copies of the pertinent regulations that you have talked about? A. Yes, sir, I have the provisions, the original Sugar Order, Amendment 7, which was

the first change in the provision regarding replacement, Amendment 11, 12, 28, and 70 which covers through 1943.

Mr. Hull: I should like to have these marked for identification.

The Court: Mark them.

(Marked Exhibit G-1 for identification.)

Q. Now, one further question. Underlying the promulgation of these replacement regulations, what was the attitude toward the Army and Navy? A. The basic quota which was to take care of civilian needs would permit persons during 1942 and 1943 to supply approximately 70 per cent of their 1941 customers or 70 per cent of the amount that they delivered to 1941 customers. Any deliveries that were made—in order not to curtail the amount of such deliveries, they applied for replacements. Now, any sugar that anyone got in excess of this could come from only one source and that is out of the Army and the Navy allocation, because the allotment percentage of 70 per cent

used up all the civilian sugar available for distribution. Therefore, if anyone applied for sugar in excess of these, other than canners and manufacturers of condensed milk which were put on another basis entirely, he would be using it out of the Army and Navy supplies.

Q. Now, the only purpose of these regulations for replacement was to protect the supply for the Army and the Navy? A. Yes, sir.

—40—

Mr. Hull: Cross-examine.

Cross Examination by Mr. Barshay:

Q. Mr. Quick, syrup and sugar is a rationed product, is it not? A. You will have to define the term syrup. Some types of syrup are rationed and some types of sugar are not rationed.

Q. Well, specifically a flavored syrup is a non-rationed product, is it not? A. Some flavored syrups are rationed and some are not. A simple syrup containing a trace of flavoring so small as to be undetectable would be classed as a sugar syrup and would be a rationed product.

Q. Do you know what the term baume is? A. Yes.

Q. When you speak of 32 baume with reference to syrups can you tell this jury, please, how much sugar is involved—withdraw it.

Can you tell us how much sugar by pound for every gallon? A. No, I cannot tell you that, sir.

Q. Who determines whether the amount of flavoring makes the syrup a rationed or non-rationed product? A. Who determines?

Q. Yes. A. —whether the syrup is rationed or non-rationed product.

Q. Yes. A. It would be determined by the regulation covering what is sugar. The regulation specifically pro-

—41—

vides that simple syrup is sugar. It provides also for the definition of sugar. Sugar is a product from sugar beets or sugar cane which contains less than 6 per cent non-sugar solids other than solids which might have been added and includes invert sugar, raw sugar and about ten other types of sugar.

Q. Now we get away from sugar and talk about vanilla flavoring and syrup. Who determines whether or not— A. Ration Order #3.

Q. Ration Orders #3 determines whether or not a particular vanilla flavored syrup is a rationed product or not, is that so? A. Yes, sir.

Q. Have you got it here? A. Yes, sir.

Q. It is in there? A. Yes, sir, in the exhibit.

Q. Now, does it specify just how much flavoring makes the syrup a non-rationed product? A. It does not specify directly. I would be pleased to give you an interpretation as to when it is and when it is not.

Q. Would you give it to us, please? A. Once you have obtained a product known as sugar, that is you have run your cane just through the centrifugal and certain non-sugar solids have been spun off and it has dropped into the basket and run through the dryer, it is crystalized, it might be still invert or raw; if you add vanilla flavoring to liquid sugar which would be sugar put in water and heated, if you add enough flavoring or if the flavoring permeates the

—42—

solution so that in the trade and generally is known as

something else, other than simple syrup, then it would not be classed by us as sugar.

Q. It would be a non-rationed product? A. That's right.

Q. And then the purchaser could buy as much as he could? A. Yes, sir.

Q. Now, did you discuss this case with Mr. Hull? A. Yes, sir.

Q. Well, you testified at the first trial, did you, Mr. Quick? A. Yes.

Q. And you gave substantially the same testimony as you gave here? A. Yes, sir.

Q. He laid the facts before you, did he not, concerning this case with respect to your testimony? A. He did.

Q. Substantially? A. Substantially, yes.

Q. And did you look at the invoices? A. No, sir, I have never looked at any of the invoices.

Q. Did you know the subject of sales here is imitation vanilla syrup or vanilla syrup? A. No, sir, I have never discussed it.

Q. You do not know then how much vanilla was placed in this syrup, do you? A. No, sir.

Q. As a matter of fact, prior to May 1, 1944, companies were permitted to import from Cuba and from Mexico as

much vanilla flavored or flavored syrup as they could, isn't that so? A. Subject to the regulations issued by the Bureau of Census and the State Department and two or three other Government agencies.

Q. But it was not considered a rationed product prior to May 1, 1944? A. Certain flavored syrups were not considered.

Q. That is dependent upon the amount of flavoring as you described, is that so? A. That's right.

Q. As a matter of fact you know from your own knowledge that the Pepsi-Cola and other companies did order from Cuba and Mexico untold millions of gallons of syrup? A. I do not know of my own knowledge that they imported anything at all.

Q. Did you hear it discussed or were you asked an opinion whether they could or not in Washington; were you asked for such an opinion? A. Yes, I was asked for such an opinion.

Q. And did you say that, as you said here, depending upon the amount of flavoring—isn't that so? A. That's right.

Q. —they could import as much as they could? Incidentally, is there any specific amount of flavoring numbers that is specified that would make a rationed product non-rationed? A. No, there is not.

—44—

Mr. Hull: Just a minute, if the Court please, we are not contending for the purpose of this trial that the syrup delivered by the Fresh Grown Company to Sealfon was a rationed commodity.

Mr. Barshay: That is a concession. Thank you, sir.

—45—

The Court: Call your next witness.

Mr. Hull: Mr. Hutson.

Eyare M. Hutson—for Government—Direct

EYARE M. HUTSON, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Hutson, what is your position with the Government? A. Food rationing representative for the State of New Jersey.

Q. Where are you stationed? A. Newark District Office.

Q. Are you familiar with the replacement records of the Fresh Grown Preserve Company as contained in the files of the Newark office? A. As they were contained, yes.

Q. What's that? A. As they were contained, yes.

Q. What do you mean by that? A. Well, the files in the Newark office were forwarded to the Enforcement Department, OPA.

Q. Well, have you examined the file of the Fresh Grown Company in order to ascertain its basic quota? A. I have.

Q. What did you find to be the basic quota of that company for the year 1943?

Mr. Barshay: I object to this, your Honor, as not binding on the defendant Sealfon.

The Court: Well, I don't know whether it is material or not. I don't see how the defendant is hurt by it. It is a fact. I shall allow it. You may have an exception.

—46—

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

A. In 1943 their basic allotments should have been 2,100,028 pounds.

Q. Say that again, please. A. 2,100,028 pounds.

Q. How about the year of 1944 up to April the 11th? A. Up to the time the allotments were stopped, their basic allotments totaled 208,925 pounds.

Q. Was the basic quota terminated on that date of April 11th? A. That's right.

Q. 1944.

Mr. Hull: Cross-examine.

Cross Examination by Mr. Barshay:

Q. You testified at the last trial, of course. A. Just what I have testified here.

Mr. Barshay: That is all.

May I have the Court's permission to recall Mr. Quick for just two or three questions?

The Court: Yes.

CHARLES W. QUICK, recalled.

The Court: Cross-examination, is it?

Mr. Barshay: Cross-examination. My notes show that I overlooked something.

Cross Examination by Mr. Barshay (Continued):

Q. Mr. Quick, whenever you formulated or your depart-

ment formulated an order, it was customary, was it not, to transmit it to all the ration boards so that they could see it and enforce it? A. Whenever any amendments were drafted, teletypes and printed instructions were made available to all district offices and through them to the local boards.

Q. So that with respect to General Order 11, which went into effect sometime in 1943, in July or August of 1943, whichever day, that was one of the orders transmitted in the regular course, as you just described? A. Yes.

Q. And that deprived each local board in the respective district in the country from the right to issue replacement certificates as of July 1st, 1943, with respect to futures, or August 1st, 1943, with respect to past deliveries? A. That's right, sir.

Q. So subsequent to July 1st, 1943, and August 1st, 1943, as I have described, a ration board member of the Rutherford Ration Board had no right to issue a replacement certificate.

Mr. Hull: That's conceded.

Q. Is that so, Mr. Quick? A. That's right.

Q. Was there a change in the form of certificates subsequent to July 1st, 1943? Was there? A. As soon as the ration banking system became permanently established, certificates were no longer issued and checks instead were issued.

Q. Well, may I know this, Mr. Quick: Does the certificate

issued by the exempt agency, like the Army or the Navy, subsequent to July 1st, 1943, differ from the one that had previously been issued by the local board? A. It might or it

might not. We provided that the Army could issue certain things which were known as emergency acknowledgments. I don't think that you would be interested in those so much. And then they were also authorized to issue certificates, and then later on checks.

Q. Would you deem, sir, the issuance of certificates by the local board subsequent to the change in the law commencing August 1, 1943, null and void? A. No, they would not be null and void; they would be unauthorized but they would be legal. It would be subject to recapture on the part of anyone who had obtained them, but they would be legal tender for the issuance of sugar to the particular applicant.

Q. So that anyone who knew of the change of rule would not issue such replacement certificates. A. That's right, sir.

Mr. Barshay: Thank you.

The Court: Anybody that knew that wouldn't issue them?

The Witness: Pardon me. He might not issue, should not issue.

The Court: Should not issue.

The Witness: Should not is right.

—49—

Mr. Barshay: I beg your pardon. That is what I should have said.

Q. In other words, a member of the ration board who had knowledge of that order had no right and therefore should not have issued— A. Should not have issued.

Q. —a replacement certificate. A. That's right

(witness excused.)

Mr. Hull: Mr. Blaufox.

GAZELLE BLAUFOX, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mrs. Blaufox, what is your position with OPA? A. I am an interviewer,

Q. Where are you stationed? A. At the District Office, 350 Fifth Avenue, New York City.

Q. In your capacity there have you familiarity with the records of industrial users concerning their applications for replacement and for basic quota? A. I have, yes.

Q. Have you examined an application for such basic quota made by Sero Syrup Company? A. I have.

Q. In what name was that application submitted? A. It was made in the name of the Sero Syrup Company, signed by Robert Sealfon.

Q. What were the basic quotas established based on that application for the years of 1942, 1943 and 1944? A. The

basic quota was established in 1941; the allotments were issued in those years.

Q. What were the allotments that were issued for each of the three years that I have mentioned?

Mr. Barshay: I object to that, sir. It is immaterial, incompetent to this issue.

The Court: Why do you think it is immaterial?

Mr. Barshay: The basic quota of Mr. Sealfon has nothing to do with the acts complained of in the indictment. If Mr. Hull's contention is correct, sir, as he said to this Court and jury, that the National

Biscuit Company purchased a non-rationed product, then it doesn't make any difference what the basic quota of Mr. Sealfon is.

Mr. Hull: It makes a lot of difference with respect to his dealings with Greenberg.

The Court: It may be material to show that he had some motive for engaging in the dealings alleged by the Government. I shall allow it. You may have an exception.

Mr. Barshay: Exception, sir.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. What are the figures, please? A. In 1942 they were issued 136,430 pounds. In 1943, 189, 707 pounds; and in 1944, 202,408 pounds.

—51—

Mr. Hull: You may cross-examine.

Mr. Barshay: No questions, your Honor.

The Court: All right, you may step down.

Mr. Hull: Mr. Sanford Doctors.

SANFORD J. DOCTORS, called and sworn on behalf of the Government, testified as follows:

Mr. Barshay: May I interpose an objection now, your Honor?

The Court: I presume your objection is based on the fact that this witness will give the same testi-

mony as was given by him in the previous trial charging conspiracy.

Mr. Barshay: Yes; and I should add the legal language, if you will permit me, sir.

The Court: Yes.

Mr. Barshay: The additional reason, by reason of the introduction of the same testimony upon the former conspiracy trial of this defendant, which was then deemed essential, material and relevant to the issue therein determined in favor of the defendant.

The Court: I shall deny your motion. You may have an exception.

Mr. Barshay: Exception.

[Which exception is hereby allowed and sealed accordingly.

—52—

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Direct Examination by Mr. Hull:

Q. Where do you live, Mr. Doctors?

The Court: I shall overrule your objection, rather. You may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. Where do you live, Mr. Doctors? A. 1401 Elm Avenue, Brooklyn.

Q. Well, where were you employed in the year 1943? A. Kraemer & Company, New York.

Q. Did your employment there terminate sometime in that year? A. Yes, it did.

Q. On what date, and what was the occasion thereof? A. Well, I was inducted in the Army July 29th.

Q. Prior to July 29, 1943, how long had you worked at Kraemer & Company? A. Since 1937.

Q. What was your position there? A. Salesman.

Q. In your capacity in that office did you have occasion to meet and to know of the Fresh Grown Preserve Company, or of Murray or Leo Greenberg? A. Yes.

Q. In what way? A. Well, I knew of them through some contact or generally heard of them in the trade, in the normal course of business.

—53—

Q. How long had you known Murray Greenberg before 1943? A. I think I might have met him somewhere around 1938, somewhere along that time.

Q. Does that apply as well to Leo Greenberg? A. What was that?

Q. Does that apply to Leo Greenberg too? A. I think so.

Q. Were they or was Fresh Grown Preserve Company a customer of Kraemer's before 1943, at any time? A. I am not sure. I think they might have done some business with them; just what it was I don't know.

Q. In the same capacity did you know Robert Sealfon? A. Yes, I did.

Q. How long had you known him? A. Oh, several years.

Q. Prior to 1943 had Robert Sealfon been a customer of Kraemer's at any time? A. No.

Q. Now, in the early part of 1943 did you have occasion to bring Murray Greenberg and Robert Sealfon together? A. Yes.

Q. How did that come about? A. The Fresh Grown Preserve Corporation offered some syrup for sale and I visited Robert Sealfon and told him of it and asked him if he could use it.

Q. Were some sales made following that? A. Yes

Q. Those were handled in the account of, on the records of, the Kraemer & Company, were they not? A. (No answer.)

Q. Some of them, in the beginning? A. Yes, I suppose so.

—54—

Q. And is it not also true that as to those, commissions were paid to the Kraemer Company and recorded in its books?

Mr. Barshay: I object to it unless he knows that of his personal knowledge.

The Court: Do you know whether they were or not?

The Witness: I couldn't hear his question.

The Court: Repeat the question.

The Witness: No, I mean Mr. Barshay's question.

The Court: Well, never mind his question. Repeat the question.

Q. (Repeated by the Reporter.)

The Court: Now, do you know of your personal knowledge whether they were recorded in the books or not?

A. I do not.

Q. Do you know whether commissions were paid in the beginning for the first transactions, to Kraemer & Company?

A. Of my own knowledge?

The Court: Yes

A. (Continuing) Were they paid—did I see a check given, or something like that?

The Court: Well, do you know of your own knowledge, from the records, or from an inspection of the records, or from seeing it?

A. No, I don't.

Q. All right. Did there come a time, sometime around

—55—

February, 1943, when you had a talk—

The Court: Well, let me understand. There had been dealings between the Fresh Grown Preserve and Sealfon in which your employer acted as the intermediary?

The Witness: Well, I, as a salesman, acted as an intermediary for the company.

The Court: For the company.

The Witness: But when you said to me did I see anything recorded in the books, I don't know.

The Court: You did that in the ordinary course of the business of your company, for your company?

The Witness: That's right.

The Court: And the dealings were between Seal-

fon and the Fresh Grown through the intermediary of your company.

The Witness: That's right.

Q. All right. Now, coming into February, 1943, was there an occasion on which you had, just answer this yes or no, was there an occasion on which you had a conference with Murray Greenberg, a discussion with him, concerning the scarcity of sugar? Yes or no. A. Yes.

Q. As a result of that conversation with Murray Greenberg did you go to see Sealfon? A. Yes.

Q. What did you tell him? A. I told him that Murray Greenberg wanted him to write a letter saying, listing

forth where he sold the syrups to and to what exempt agencies he sold them to. If he would write him that letter he would sell him more syrup.

Q. You told that to Robert Sealfon? A. Yes.

Q. What happened then, as to the writing of the letter, so far as you know? A. What was that, sir?

Q. What happened so far as you know after that, as to the writing of a letter? A. (No answer.)

Q. I will withdraw it. Did Sealfon give you a letter such as you asked for, then and there? A. No, he did not.

Q. What did happen? A. He said he would let me know.

Q. Go ahead. What happened after that? A. And later on, I think Mr. Greenberg spoke to me again about it and I in turn spoke to Mr. Sealfon. Several days or so elapsed, I don't know how many exactly, but I learned subsequently that such a letter had been written.

Q. How did you know that? How did you learn that? A. I was told either by Mr. Sealfon that he had sent it, or Mr. Greenberg that such a letter had been received.

Q. For your part in these negotiations did you receive anything from Mr. Sealfon?

Mr. Barshay: I object to the form of the question.

The Court: You object to the form of the question?

Mr. Barshay: Yes. It sets forth a conclusion; "for your part in these transactions." We don't know for what part.

—57—

Mr. Hull: I will withdraw it.

The Court: Well, did you receive money from Sealfon?

The Witness: Yes. I testified to that before.

The Court: Well, you are not testifying at the last trial; you are testifying here now in response to questions asked now.

Q. In what way did he pay that to you? A. Check.

Q. Over what period? A. Do you want the dates?

Q. No, generally.

The Court: No, over what period?

A. Over the period of a couple of years.

Q. Did that continue after your induction? A. It did.

Q. And what did he do with payments then? that is to say, while you were away in the service. A. He sent them on home to my wife.

Q. How much did you receive all together from him? A. (No answer.)

The Court: Just give us your best recollection, approximately.

The Witness: Yes.

A. Around—

The Witness: Is he going to type what I say (indicating the Reporter?)

The Court: What?

—58—

A. Around $10,000.

Q. Mr. Doctors, what was that for? A. My commissions for aiding—for finding the syrups for him, for getting the syrups for him.

Q. For getting the syrups after the letter was written, is that right?

Mr. Barshay: Now I object to that.

The Court: Well, let's see. When was the first payment made?

The Witness: I was paid prior, before the existence or request of any letter.

The Court: What were you paid for?

The Witness: For obtaining the original sale, for helping him consummate the original sale.

The Court: With Greenberg?

The Witness: That's correct.

The Court: Now, were you acting as an employee of your company, doing that?

The Witness: I consummated the first sale as an employee, yes.

Q. Did Kraemer know about it? A. About the sale?

Q. About your consummating—

Mr. Barshay: I object to that. That is not binding on the defendant.

The Court: No.

—59—

Mr. Hull: I will withdraw it.

Q. Did you have any agreement with Sealfon as to the amount that you would get? A. I did not have any agreement.

Q. In what way was that handled? A. Well, he just simply said that "if you are able to obtain the syrup" that he would pay me a commission of some kind for doing so.

Q. You left that, the amount up to him, is that correct? A. That's true.

Q. Did the amounts increase as time went along or not? A. Well, I was away most of the time and so I can't really answer for the amount of moneys that were given all along the period from the start of it to the end.

Q. The payments that did come in related to deliveries, did they not, at approximately the time of the payment? A. I didn't get the beginning of your question.

Q. I will withdraw it. You don't say that the full $10,000, or whatever the figure was that you received, resulted from sales that were made before the letter was written, do you?

Mr. Barshay: I object to that.

The Court: It is a leading question anyhow. I will sustain the objection.

Q. What part of the $10,000 did you get for deliveries of sales made before the letter was written? A. I can't answer as to the amount offhand.

—60—

Q. Were some of the payments to cover sales made afterwards? A. Some of the payments were made after the letter was written, yes.

Q. Covering sales—

The Court: Well, were the payments made before or after your discussion with Sealfon that led to the dealings between Sealfon and Fresh Grown through your agency?

The Witness: I was paid after any letter was written.

The Witness: I haven't got those things before me; I can't answer. There might have been 20, there might have been 10.

The Court: But they were made after you had discussed with Sealfon the possibility of securing syrup from Greenberg.

The Witness: They were made after the initial sale was consummated.

Mr. Hull: Cross-examine.

Cross-Examination by Mr. Barshay:

Q. You testified, Mr. Doctors, at the last trial? A. I did.

Q. You were called by Mr. Hull as a Government witness? A. I was.

Q. Since the last trial, sir, have you seen Mr. Hull and discussed your testimony again? A. I reported down here yesterday, not particularly to discuss the testimony.

Q. Well, did you discuss the testimony, irrespective of the reason for your coming here? Did you? A. No.

Q. Did you read your testimony? A. Did I read my testimony?

Q. Yes. Was it shown to you? A. Given at the trial?

Q. Yes. A. No.

Q. Was it discussed with you by anyone? A. No.

Q. Do you recollect the testimony that you gave then? A. Yes, I do.

Q. All right. Now, Mr. Doctors, you had known Mr. Sealfon for several years before 1943? A. That's correct.

Q. You had been a friend of his, in a measure. A. That's correct.

Q. You never did any business with him at all? A. That's correct.

Q. Would you mind, please, so I can hear you, removing your gum? I can't hear you; you drop your voice.

A. (The witness complied.)

Q. You were working for Kraemer & Company, were you? A. Correct.

Q. Kraemer & Company had no business whatever with Mr. Sealfon? A. That's correct.

Q. You brought about no deals on behalf of the Green-

bergs or the Fresh Grown and Kraemer & Company, or through Kraemer & Company, before you met Mr. Sealfon, did you—before you did business with Sealfon? A. No; no, I did not.

Q. Of course Mr. Greenberg had known that you were employed by Kraemer & Company? A. That's correct.

Q. He knew that you were an employee of that company? A. That's correct.

Q. Whatever business he had before that time, he had directly with Mr. Kraemer? A. That's right.

Q. And so one day Mr. Greenberg approached you, did he not? A. Yes.

Q. Did he approach you in the capacity, if he told you or not, as an employee of Kraemer & Company, or did he approach you slyly, on the side? A. No, he approached me as an employee of Kraemer & Company.

Q. Open and above board, right? A. Right.

Q. And he made what you deemed a reasonable request; he had syrup and you being employed by a broker, you tried to get rid of it for him. A. That's right.

Q. It was flavored syrup, was it not? A. That's right.

Q. Now, at that time was there not prevalent in the trade what you may call or what was called as a finder, or a finder's commission man? A. That is correct.

Q. Before the scarcity of sugar, a broker would get a commission from the seller, would he not? A. That's right.

—63—

Q. And with rare exceptions there was a time when a broker would get commission from the buyer. A. That's true.

Q. You knew that, did you not? A. I did.

Q. And with the scarcity of sugar that system increased, did it not? A. That is true.

Q. Because of the scarcity of a given product, a man

would be willing to pay a finder's commission, even though he was a purchaser. A. That is absolutely true.

Q. And you were in that position, were you not? A. I was.

Q. Now, you knew Sealfon for several years before 1943, you said. A. Yes, I did.

Q. You know he bore a reputation for honesty in the trade? A. I did.

Q. You knew he had a place over in Manhattan Avenue in Brooklyn. A. Yes.

Q. He had never asked you to do any business with him? A. No.

Q. You were the first one to approach him. A. That is true.

Q. And so there came a time when the Greenbergs said to you, "Can you get me anybody to buy vanilla syrup?" Is that so? A. Well, substantially, yes.

Q. And so you said, "Yes, I'll try." Is that correct? A. That's true.

—64—

Q. And then did you have in your mind to get in touch with somebody? A. That's true.

Q. Then you gave a call to Mr. Sealfon? A. I did.

Q. And you asked him whether or not he would be willing to purchase vanilla syrup? A. That's true.

Q. And being in that business he said, "I would be glad to." Is that correct? A. Essentially, yes.

Q. And so you brought about a sale of vanilla syrup from the Fresh Grown to Sealfon. A. That is true.

Q. Now, Mr. Sealfon didn't say to you, "Conceal that transaction from Kraemer," did he? A. He did not.

Q. He made no improper suggestion to you whatever. A. None whatever.

Q. Did you ask him for a commission, a finder's commission? A. I think it came out in the conversation, that such a commission would be given.

Q. And you were willing to accept it? A. Would I accept it?

The Court: Whose idea was that? Was that Sealfon's idea that he would pay you, or your idea that you wanted to be paid?

The Witness: Well, it was an idea that was—

The Court: No, excuse me. I didn't mean an idea. Who spoke the words that indicated how much was to be paid or whether it was to be paid?

—65—

The Witness: Well, sir, that was just something that was in the air; I mean in the conversation it was more or less understood that I was getting—

The Court: Did he offer to pay you?

The Witness: Yes.

The Court: All right.

Q. When you say he offered—

The Court: Did you ask him to pay you?

The Witness: Well, if he didn't offer to pay, I was going to ask.

The Court: Wait a minute, now. We are not asking you "if"—the possibility. What is your best recollection? Did you ask him to pay you, or did he

say he would pay you? Give us your best recollection.

The Witness: I think he told me that he would pay me, and, as I stated, such a thing was prevalent in the trade, and I don't think it has any particular bearing whether he offered to pay me or—

The Court: It doesn't make any difference what you think. We are trying to find out what the facts are, and you will testify as to facts, not what you think.

Q. Have you a distinct recollection as to what transpired in that conversation? A. A distinct recollection?

Q. Yes. If you haven't, please don't tell us. A. No, I haven't a distinct recollection of actually what transpired

—66—

at that time.

Q. So when you say here that it was Mr. Sealfon who said he would pay you the commission, that is not as a result of any distinct recollection, is it? A. No. To the best of my knowledge I think that came out.

Q. It may have been, Mr. Doctors, that because of the prevalent system there, in the general discussion you suggested because you brought the customer that you would like to get a finder's commission, isn't that so? A. Yes.

Q. It is just as possible, isn't it,—

The Court: Well, we will not indulge in possibilities.

Mr. Barshay: All right.

The Court: We will ask you to give your best recollection. Now what is your best recollection as to whether you asked for the fee or he said he would pay you the fee. What is your best recollection?

The Witness: My best recollection is that he said he would pay me.

The Court: All right.

The Witness: A commission.

—67—

Q. You say that is your best recollection but I say to you again you have no distinct recollection of that point.

The Court: Well, his best recollection is all he can testify to.

Mr. Barshay: All right.

Q. Now that wasn't an unusual matter, was it? A. It was not.

Q. You attached no undue significance to it, did you? A. Absolutely not.

Q. And you said to this Court and jury that if he didn't offer it you would ask for it anyway. A. That is correct.

Q. You felt you had earned it. A. Yes, sir.

Q. Especially at the time. A. That is true.

The Court: Well, were you being paid by Kraemer at this time?

The Witness: There was no definite understanding.

The Court: Were you being paid by Kraemer?

The Witness: I was being paid a salary.

The Court: And what were your functions at that time?

The Witness: As a salesman to go out and contact the trade.

The Court: And arrange deals like this, is that it?

The Witness: Anything that was offered in the firm; if I felt I could handle anything I was given that to handle.

—68—

Q. Mr. Sealfon never suggested in the slightest degree that you refrain from telling any arrangement you had with him to your employer, did he? A. He did not.

Q. As a matter of fact he called you at your place of business. A. He did.

Q. And as a matter of fact when you weren't in you got a message, did you not, that Mr. Sealfon wanted you to call him back? A. That's right.

Q. And that message was recorded on the Kraemer books, on the message book? A. Yes.

Q. And as a matter of fact Mr. Sealfon did see you at Kraemer's office? A. I don't know any particular occasion, no.

Q. You wouldn't say he wasn't there, would you? A. I wouldn't say that.

The Court: Give us your best recollection of that. Did you meet him in Kraemer's office or did you not?

The Witness: I recall that he was up there.

The Court: How many times did you meet him there?

The Witness: Oh, I don't know.

Q. To your knowledge Mr. Kraemer and Mr. Sealfon are known to each other, isn't that so? A. Yes.

Q. Isn't it customary in the trade that when you bring about a sale of merchandise whoever agrees to pay you com-

mission does so as long as the sales are consummated? A. That is true.

The Court: Is it the custom in the trade if you are an employee of a company which handles your type of business, is it a custom in the trade that the employee be paid or the firm for which he is working be paid? What is the custom of the trade?

The Witness: I don't know particularly that there is a custom. You have it both ways.

Q. Mr. Doctors, you considered Greenbergs the client of Kraemer, did you not? A. Yes.

Q. You didn't consider Sealfon a client of Kraemer, did you? A. No.

The Court: Well, let me ask you, when you conduct these negotiations is it the practice of the trade to collect from both ends?

The Witness: Well, sir, there is such a thing as Mr. Barshay has said as a finder's commission.

The Court: I know there is such a thing as a finder's commission. Now, what is the practice of the trade there? Is the finder's commission paid to the company who handles the deal and finds the customer or the person who handles the deal for the customer and finds the product?

The Witness: It all depends on the particular transaction.

—70—

The Court: Well, if it depends on the particular transaction what is the custom of the trade? Who gets the fee? Does the person who handles it working for another man get it personally or does the man for whom he is working get it as a custom of the trade?

The Witness: I cannot answer that, sir, in this respect. I know in this particular transaction I received money from Mr. Sealfon and I—

The Court: And you were paid your salary by Mr. Kraemer.

The Witness: That is correct.

The Court: Did you receive commissions from other customers that you were handling at this time?

The Witness: Not at that particular time, no.

The Court: Not at that particular time.

Mr. Barshay: May I proceed, your Honor?

The Court: Yes.

Q. Now, Mr. Doctors, you wrote a letter to Mr. Sealfon, did you not, that you were an independent broker? A. I did.

Q. And you signed it yourself? A. That is true.

Q. So that at no time did you tell Mr. Sealfon that you had been acting on behalf of Kraemer, did you? A. No, I don't think I did.

Q. Well, you were the one who said that you brought about this deal, isn't that so? A. That's true.

Q. Mr. Kraemer knew that, did he not? A. He did.

The Court: Kraemer knew about this deal?

The Witness: The initial sale, yes, he did.

The Court: The initial sale; did he know about the whole transaction?

The Witness: I don't know.

Q. As a matter of fact Mr. Kraemer received money from the Greenbergs for commission in this very deal? A. I never saw a check, but I assume that such a thing did take place.

Q. You know that from hearing it discussed in the office? A. That's right.

The Court: Did you know it from the record?

The Witness: I never saw any records, but I know he must have received money from the sale.

Q. You know of your own knowledge that Mr. Kraemer was active himself with the Greenbergs in other matters and that they paid him a commission for your work in this deal in the very beginning? A. That's true.

Q. Now, you said—

The Court: Now, let me ask you: In any of your dealings with other customers of Kraemer did you receive any compensation other than that which you received from Kraemer?

The Witness: No, I don't think I dealt with any other.

—72—

The Court: Did Kraemer know that you received this compensation from Sealfon?

The Witness: He did not.

Q. Sealfon didn't tell you to conceal it, did he? A. He did not.

Q. Sealfon made no such suggestion whatever? A. Absolutely not.

Q. That was your own act? A. That is right.

Q. And that was a matter betwen you and Kraemer? A. That's true.

Q. With which Sealfon had absolutely nothing to do in any shape, manner or form. A. He did not have anything to do with it.

Q. And as a broker, as an independent broker having brought about a sale you were entitled to commissions for every transaction between the purchaser and the seller.

Mr. Hull: I object.

Q. Isn't that so?

Mr. Hull: I object to it because it embodies something that is not in evidence. He said, "As an independent broker," and that is not the evidence.

Mr. Barshay: He said, your Honor,—

The Court: I don't care what he has called it. He has testified that his original transactions were undertaken as an employee of Kraemer going to

—73—

represent a situation to a client of Kraemer's, to

Sealfon. He didn't go to Greenbergs on his own initiative and then go to Sealfon as I gathered from the testimony, because he has testified in response to your question that Greenberg was a client of Kraemer and Kraemer was paid by Greenberg.

Mr. Barshay: That's right, your Honor.

The Court: I will not allow the question as framed.

Mr. Barshay: Will you permit me to argue the point?

The Court: I will not allow the question as framed. You say "as an independent broker." You may ask him the factual situation without the characterization.

Q. Mr. Doctors, you brought about this sale with Sealfon and Greenberg personally, did you not? A. I did.

The Court: You acted as an employee of Kraemer in the original instance?

The Witness: I did.

Q. You didn't tell him that you were acting in any particular capacity. A. I didn't tell him I was acting in any particular capacity; I just went there and offered him whatever was being offered at the time.

The Court: How long had you known Sealfon?

The Witness: Several years.

The Court: Did Sealfon know that you were employed by Kraemer?

—74—

The Witness: Yes.

Q. But you never had any business with him personally or through Kraemer. A. No.

Q. Isn't it so that is the first deal of any kind? A. That's right.

Q. That you solicited him? A. That's right.

Q. He didn't solicit you at all? A. That's true.

Q. At no time did he tell you that he wanted to buy syrup from anyone in this world. Isn't that true? A. That's true.

Q. And so you brought about the sale and you received commissions, did you not? A. I did.

Q. And then you wrote him this letter that you were an independent broker. A. I did.

Q. Now, the checks that Mr. Sealfon made started from the very first sale, did they not? A. Yes.

Q. And following the custom where a person brings about a sale you were entitled to receive commissions from every sale whether you were present or not, isn't that so? A. Yes.

Q. And while you were here before you were inducted into the Army did you receive checks from Mr. Sealfon for your services in this matter?

The Court: What I am trying to get at is the custom of your trade. You see—I mean Mr. Barshay, I want to get this straightened out in my mind.

—75—

Here is this man working for Kraemer. He initiates a business deal between Greenberg and Sealfon as an employee of Kraemer.

Mr. Barshay: Well, that is where we differ, your Honor.

The Court: That is what he testified to a minute since.

Mr. Barshay: I know, your Honor, but may I urge this point, if you will permit me, please?

The Court: Yes.

Mr. Barshay: He testified very clearly that he did not let Mr. Sealfon know in what capacity he was acting. If he wanted to do something wrong, sir, with Kraemer it must not be charged to Sealfon.

The Court: Not at all. I am not saying that.

Mr. Barshay: If he did anything wrong—

The Court: But he didn't say he did anything wrong. He said as an agent of Kraemer he dealt with these two men. That is perfectly proper. Now then, you are asking the question was he entitled—and you are asking him to pass on the question whether he was entitled to this thing as a matter of law and as a matter of fact. Now he says he is not able to testify to any custom of the trade, he is not able to testify to the fact that he did it in any other case or not. As a matter of fact he says he did not. Now you are asking him to testify that as a matter

of law and fact he was entitled to it. You may bring out the facts and let the jury draw the inference.

Q. I will ask you very clearly, if I can, Mr. Doctors, when you walked over to Sealfon did you say to him, "I am acting for Kraemer," or, "I am acting for myself?" What did you say? A. I said neither.

Q. What? A. I didn't say either one of them.
Q. But then you wrote him this letter. A. I did.

The Court: When did you write the letter?

The Witness: I don't recall the date.

The Court: How long after the first incident?

The Witness: Oh, it must have been some time after; it might have been a month; it might have been a week.

The Court: Now why did you write the letter?

The Witness: Because I was receiving money from which I had to pay an income tax and whatever was necessary for me to do that—

The Court: It was necessary for you to declare, to write a letter to Sealfon?

The Witness: There was such a thing as a withholding tax at that particular time and when you act as an independent broker or something on the occasion of that particular time, when you might have worked at two or three different other places all at the same time, it was not uncommon that you would write a letter to whoever you worked for

or to other companies that you did business with, such a letter saying you were an independent broker and because of that you would not be subject to that particular 20 percent or whatever it was.

The Court: That was for the purpose of—

The Witness: That was the purpose of writing the letter.

Q. Sealfon didn't ask you to do that? A. No. It was something that was necessary and had to be done; whether he requested it or not I did it.

Q. The point is whatever Sealfon paid to you was always by check? A. That's right.

Q. Never by cash? A. That's right.

Q. It was always by his own check? A. That's right.

Q. And you received it, did you? A. I did.

Q. And either you cashed it yourself or you endorsed it over to your wife. A. Whatever it shows there.

Q. And during the time that you were in the Army the checks were coming to your wife, were they not? A. That's true.

Q. And isn't it a fact, sir, that you received a total of checks from Mr. Sealfon during all this time—I want to get the exact amount, your Honor.

Mr. Hull: I can help you.

Mr. Barshay: If you don't mind. What page?

—79—

The Court: Suppose we recess now until two o'clock and then you can coordinate your checks and the amounts and all that sort of thing.

The jury will be excused first.

NOON RECESS

—80—

AFTERNOON SESSION

SANFORD J. DOCTORS, resumed the stand.

Cross Examination by Mr. Barshay (Continued)

Q. Now, Mr. Doctors, isn't it a fact that all together by check you received from Mr. Sealfon, both while you were here in the Army in this country and in the Army overseas, the sum of $12,732.05? A. That's right.

Q. None of it or no other moneys ever came to you from him by cash? A. That's true.

Q. Now, there came a time when Mr. Greenberg spoke to you about a letter, you testified here to. A. That's true.

Q. Is it a fact that he said to you in substance that if you can have Mr. Sealfon write a letter, one, containing where he sold his merchandise to, and if there were any exempt agencies to set it forth—is that so? A. That's so.

Q. And that's exactly what you transmitted to Mr. Sealfon. Is that right? A. That's right; that's right.

Q. In other words, Greenberg did not ask you to write, to have you, rather, ask Mr. Sealfon to write any untruth in the letter? A. That is true, he did not ask me to have him write an untruth.

Q. And you didn't ask Mr. Sealfon to write any untruth in the letter? A. I did not.

Q. One question more; do you recollect when you first

—81—

spoke to Mr. Sealfon about the Greenberg and the Fresh Grown concern whether he asked you the size and the na-

ture of the Fresh Grown Preserve Corporation? A. No, he did not.

Mr. Barshay: All right.

Redirect Examination by Mr. Hull:

Q. Why didn't you tell Mr. Kraemer that you were receiving these commissions?

Mr. Barshay: Now, I object to that, sir.

The Court: What was the question?

Q. (Repeated by the Reporter.)

Mr. Barshay: As not binding on this defendant. He has already testified that my client did not ask him to conceal it and—

The Court: Well, it isn't a question only of asking him to conceal it. I think the jury is entitled to get the factual situation and to draw such inferences as logically might be drawn from the testimony given—

Mr. Barshay: Sir, that would not be binding on my client, no matter what wrong he did. He is the Government's witness. They vouch—

The Court: If this is a transaction in which Sealfon participated, it may be material.

Mr. Barshay: Your Honor—

The Court: Your contention is that his mental processes would not be binding on Sealfon in the absence of any specific arrangement made.

Mr. Barshay: Or, in the alternative, his own wrong-doing, if any. I don't say it is, but his own wrong-doing.

The Court: No, his own wrong-doing, if it were the result of Sealfon's suggestion, might be very material.

Mr. Barshay: Suggestion, concealment or consent, that already has been negatived by their witness.

The Court: What have you to say about that?

Mr. Hull: I think it is proper re-cross, your Honor. A good deal has been brought out about that.

The Court: No.

Mr. Hull: I won't press it.

The Court: All right, objection sustained.

Mr. Hull: Have you any objection, Mr. Barshay, to producing the letter that you talked about?

Mr. Barshay: No, I have none. Surely, I will give it to you (producing letter).

Q. Is this the letter that you gave answers to Mr. Barshay about? A. That is right.

Q. How did you come to write that letter?

The Court: Well, I think he explained that this morning, didn't he?

Mr. Hull: I want to know whether it was prompted by Sealfon, sir.

Mr. Barshay: Whether it was what?

The Court: Prompted.

Mr. Hull: Prompted by Sealfon.

Mr. Barshay: He has already said no, your Honor.

The Court: Well, he said the sole reason why he wrote it was because he didn't want to have any trouble about the withholding tax; that was his only purpose in writing it.

Mr. Barshay: That's right; and I asked him further, sir, whether Sealfon suggested it, and he answered plainly no.

Mr. Hull: I didn't hear that answer. I would like to ask it again.

The Court: Well, suppose you answer it again. Did Sealfon suggest you write it?

The Witness: No, he didn't.

Q. Did anybody associated with Sealfon suggest it?

Mr. Barshay: Of course, I—

A. No.

Mr. Barshay: All right, he has answered already.

Q. Did Sealfon know before you wrote it that you were going to write it?

Mr. Barshay: Your Honor, unless there is a communication he is calling for a mental operation.

The Court: Well, unless Sealfon said something

about it.

Mr. Barshay: Yes. I wouldn't object to that.

The Court: Do you know from any statement Sealfon made—

The Witness: Well, he never particularly told me to definitely write this.

Q. It is dated June 26, 1943, isn't it? A. Yes.

Q. Any special reason why it was written in June and not sooner? A. I don't know, but to the best of my recollection somewhere around that time the withholding tax was instituted as a procedure started by the Government, and on that basis I think I wrote the letter.

The Court: Who would withhold the tax? How would that affect the withholding tax?

The Witness: If you were employed—I don't know the law on it, but to the best of my recollection if you were employed in a place of business, receiving a salary, you would have 20 percent, or whatever the percentage was, the withholding tax involved—

The Court: Well, did that money belong to your employer then?

The Witness: No.

The Court: Well, what would be—

The Witness: It was money that was withheld from your salary, whatever it was.

The Court: Well, this wasn't salary, according to you.

The Witness: I mean whatever your earnings were, it would be withheld from your earnings and—

The Court: By whom?

The Witness: By whoever was paying you; and whatever money was withheld goes to the Government. Now, if you are an independent—

The Court: Well, did you excuse Sealfon from withholding it?

The Witness: Did I excuse him?

The Court: Was this to excuse Sealfon from

The Witness: I don't know how to answer that other than to say that—yes, it wasn't necessary for him to take 20 percent off and for me to account for the 20 percent; whatever moneys I would receive—

The Court: Well, did you write this so that Sealfon wouldn't have to withhold 20 percent?

The Witness: Yes.

The Court: Did you tell Sealfon that?

The Witness: Yes.

The Court: Did you dicuss it with him before you wrote the letter?

The Witness: I don't think there was too much

discussion about the letter.

The Court: No, I am not talking about too much discussion. Did you discuss it with him before you wrote the letter?

The Witness: Well, to the best of my knowledge I think that I said to him that it will be necessary for me to write some sort of a letter saying that, excusing him or preventing him from withholding the 20 percent, or whatever the percentage was in

volved at this particular time, and that I would account for that myself in my own income tax statements, which I have done.

The Court: Well, why did you write the letter?

The Witness: Well, as an independent—

The Court: Well, writing a letter didn't make you an independent broker, did it?

The Witness: Why, I think it did.

The Court: You either were or were not, whether the letter was written or not.

The Witness: Well, I think it—Well, I don't know.

Mr. Barshay: May I respectfully object to the question as one of law, and—

The Court: What?

Mr. Barshay: May I respectfully object to the question as one of law which the witness is not able to answer?

The Court: I will sustain your objection.

Mr. Barshay: Thank you.

The Court: But you wrote the letter because you thought in that way Sealfon wouldn't have to deduct the 20 percent, is that it?

The Witness: That is correct.

The Court: And you did that after discussion with Sealfon?

The Witness: Well, I told him I thought that was proper, that's right.

The Court: All right.

Q. Did you ever talk to anybody else in Sealfon's office or connected with Sealfon, about that? A. No, I didn't.

Q. In particular, did you talk to Mr. Rosen about it? A. No.

Q. Do you know who Mr. Rosen is? A. I have heard him referred to. I don't know him in any social way or professional way at all.

Q. Do you know what his connection is with Mr. Sealfon? A. Of my own knowledge, no. From hearsay I understand he is an accountant, his accountant.

Q. Sealfon's accountant? A. That's right.

Mr. Hull: I would like to have this marked for identification.

The Court: Mark it for identification.

—88—

(Marked Exhibit G-2 for identification.)

Mr. Barshay: Do you want to offer it in evidence?

Mr. Hull: If you have no objection I will offer it in evidence.

Mr. Barshay: I have no objection, of course not.

Mr. Hull: All right.

(Received in evidence as Exhibit G-2.)

Mr. Barshay: Are you finished?

Mr. Hull: Not quite.

Q. Now, Mr. Doctors, you stated on cross examination that according to the custom of the trade, payments would continue to come in as long as deliveries were made, once

a contract was entered into. A. Well, it should be the way; yes.

Q. Would they stop as soon as deliveries stopped? A. Well, if there was no more coming in, no more merchandise being sold, a man doesn't pay you for nothing.

Q. Did you receive one of these checks from Sealfon on August 20 or dated August 20, 1945? A. I did.

Q. How do you explain that, in view of the fact that deliveries stopped more than a year before? A. As I said, there was no particular arrangement between the two of us. I think at the time I was going into the Army, some understanding grew out that rather than pay exactly everything that came in or that I was entitled to get, they would spread it out so that my wife would have something—

—89—

The Court: Well, how was the amount to be determined, the total amount?

The Witness: There was never any definite arrangement between us as to a definite amount at all.

The Court: Just left to him?

The Witness: That's right.

Mr. Hull: That's all, sir.

Recross-Examination by Mr. Barshay:

Q. As a matter of fact, while you were in the Army, on the other side, your wife had been receiving these monthly checks, is that so? A. That's true.

Q. And they were all made out to you and authorized by you to her to sign and endorse them and use the money? A. Yes.

Mr Barshay: That's all. May we offer these checks for identification?

The Court: Mark them for identification. He hasn't really identified them yet, has he? Suppose you ask him just informally.

Mr. Barshay: Thank you, your Honor.

By Mr. Barshay:

Q. Mr. Doctors, just look at these checks, please. Are they the checks that you received from Sealfon? A. It looks like them, sir, yes.

Q. And look on the back and see if your name and your wife's name are on every one. A. Do you want me to go

through each individual one?

Q. Just glance at them. You have seen them before. A. Yes.

The Court: Mark them for identification.

Mr. Barshay: Thank you, sir.

(Marked Exhibit D-1 for identification.)

Mr. Hull: I am willing to let those go in as a Government exhibit, if Mr. Barshay doesn't object.

Mr. Barshay: I have no objection.

The Court: If you haven't, I don't care what you do.

(Received in evidence as Exhibit G-3.)

Mr. Hull: Mr. Murray Greenberg.

MURRAY GREENBERG, called and sworn on behalf of the Government, testified as follows:

Mr. Barshay: May I ask your Honor's permission, his brother Leo is here, and he is going to be a witness, that he be excluded from the room?

The Court: All right. Is Leo Greenberg here?

(The person addressed withdrew from the room.)

Mr. Barshay: Now, I make the same objection, your Honor, with respect to this witness' testimony on the same ground as I did before.

The Court: Well, this witness didn't testify at the last trial.

Mr. Barshay: Well, am I wrong? One of the

Greenbergs did. I thought it was he.

The Court: Did you testify?

The Witness: I did, your Honor, about—

The Court: Oh, you did. The other didn't.

Mr. Barshay: I am sorry.

The Court: I am sorry. It had escaped my mind.

Mr. Hull: Your Honor, he merely testified as a representative of the corporation to produce some records.

Mr. Barshay: I object to Mr. Hull's statement at all. This man testified and I have a legal objection, sir, on the same ground which I heretofore raised.

The Court: All right, there will be the same ruling.

Mr. Barshay: Exception, sir.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Direct Examination by Mr. Hull:

Q. Where do you live, Mr. Greenberg? A. At 160 Irvin Street, Brooklyn.

Q. What business did you operate in the year of 1944? A. The manufacture of jams and syrups.

Q. Under what name? A. Fresh Grown Preserve Corp.

Q. Was that a corporation of the State of New Jersey? A. Yes, sir.

Q. Where was its place of business? A. At Lyndhurst, New Jersey.

—92—

Q. For how long a time prior to 1944 had you operated that business there? A. Four years.

Q. Had you operated under the same name at some other place before that? A. No, sir.

Q. Was the company chartered by the State of New Jersey at that time? A. Yes, sir.

Q. What was your position with the Fresh Grown Preserve Corporation? A. I am the President.

Q. Have you always been President thereof? A. Yes, sir.

Q. What is the connection of Leo Greenberg with that company? A. Leo is the Vice-president.

Q. What is his relationship to you? A. He is my brother.

Q. What persons throughout the entire period of the corporation's existence conducted business for it? A. Leo Greenberg and myself.

Q. Were you the only two who had authority to transact business for the company? A. Yes, sir.

Q. Prior to January, 1943, had the Fresh Grown Preserve Company conducted some business through the Kraemer Company in New York? A. Yes, sir.

Q. How long before had you been a customer, can you say? A. I would say about a year and a half.

Q. Prior to the beginning of 1943 had you conducted any business with Robert Sealfon? A. No, sir.

—93—

Q. In or about January, 1943, or the first part of that year did you come to know Sealfon? A. Yes, sir.

Q. In what way did you meet him? A. I met Mr. Sealfon at the office of Kraemer and Company being introduced to him by Mr. Doctors.

Q. Did you have a conversation with him on the occasion of the meeting? A. Yes, sir.

Q. What about? A. He asked me whether I could sell him some syrups and I said that I thought I could.

Q. What happened after that? A. I did sell him some syrups.

Q. What part did the Kraemer Company play in those sales, if any? A. Kraemer and Company were the brokers.

Q. As such were any commissions paid and if so, by whom? A. Commissions were paid to Kraemer and Company by Fresh Grown Preserve Corporation.

Q. Some time in February after these business transactions had commenced—just answer this yes or no—did you have a conversation with Sanford Doctors? A. Yes, sir.

Q. Did that conversation relate in part to—answer this yes or no—to the scarcity of sugar? A. Yes, sir.

Q. Following that did you talk to Sealfon? A. Yes, sir.

Q. Tell us from then on in your own words what transactions you had with Sealfon. A. Mr. Sealfon wanted me to sell him more syrups than I was presently doing and I

told him that all the syrup that I was giving him at that time was all I could give him in line with my quota.

The Court: With what quota?

The Witness: The quota allotted to me by the ration board.

The Court: Quota for what?

The Witness: For what year, your Honor?

The Court: No, for what commodity?

The Witness: For sugar.

Q. At that time did you indicate in any way to Sealfon what your quota was?

Mr. Barshay: I object to counsel leading. It is a vital matter.

The Court: Don't lead him. Just ask him to tell the circumstances.

Q. All right. You go ahead. A. And I told Mr. Sealfon what my quota was and the reason that I couldn't sell him any more syrups because I was contracted for for most of the quota in another direction. After that I spoke to Mr. Doctors, told him—

Mr. Barshay: I object to what he told Doctors.

The Court: Was Sealfon present?

The Witness: Not at this particular time.

The Court: Well, don't tell what happened in the absence of Sealfon.

—95—

Q. What happened—

The Court: After the conversation with Doctors what happened?

The Witness: At the conversation?

The Court: After the conversation.

The Witness: After the conversation with Doctors Mr. Sealfon called me by telephone a number of times and came out to the plant at Lyndhurst a number of times. All the visits and telephone calls were for the purpose of getting more syrup than he would—

Mr. Barshay: I object to that as a conclusion.

The Court: Well, tell the conversation.

The Witness: Mr. Sealfon would ask me, "Can't I get more syrup?" and I would say no. On one occasion I said to Mr. Sealfon, "If you are selling a ration-exempt agency and would write me a letter to that effect I could sell you more syrup"; otherwise he was getting all the syrup I could give him at that time.

Q. Go right ahead and tell us the whole transaction. A. Then Mr. Sealfon visited me at Lyndhurst and said that he was selling a civilian company at the Brooklyn Navy Yard and that if he would write me a letter saying that he

was selling to or at the Brooklyn Navy Yard without mentioning the civilian company, to leave the inference that he was selling the Brooklyn Navy Yard, what kind of

—96—

a deal could he work out; and I said to Mr. Sealfon, "What kind of a deal would you like or would you want?" and Mr. Sealfon said he would like if he did that, he would like a cheaper price in the form of a rebate. And I said to Mr. Sealfon, "How much of a rebate would you want?" and he said, "Two cents a pound." And I said, "You write me that letter and you have got a deal."

The Court: Was there any discussion about amounts, quantities?

The Witness: No discussion about quantities except this with reference to amounts, your Honor, it was discussed that whatever amounts of sugar I was to get he had first option to get them and whatever he could not use himself I could use in my own direction.

Q. Was there anything said when you— A. Then—

Q. Just a moment—when you were talking about the amount of sugar was there anything said in relation to what he had been getting before? A. The only thing said was that the quantity which he would get after the letter was written would be much greater than the quantity he had received before.

Q. Was there any discussion about what you were going to do with the letter that he was to furnish? A. Yes. Then

he asked me what the routine would be if he wrote the letter and I told him that I would take the letter to the

local rationing board. Attached thereto would be invoices showing that I was shipping him syrup for shipment by him to the Brooklyn Navy Yard.

Q. Well, now, were you going to attach the invoices to the letter or to something else?

Mr. Barshay: I object.

A. Well, I was going to attach the invoices—

Mr. Barshay: Just a second. The question is the conversation to which I didn't object. Now, there is another question, your Honor, to which I do object what he was going to do.

The Court: Well, what was the arrangement made with Sealfon?

Mr. Hull: Of course, I meant that.

The Court: So far as the attachment of the invoices was concerned.

The Witness: Well, the invoices were to be attached to Form 315 which is the O. P. A. form for the request for replacement.

Q. You discussed that with Sealfon, you say? A. Yes, sir.

Q. I show you three papers, two letters and another paper marked agreement and ask you to identify those if you can and tell us whether they are related to the subject

matter of your testimony. A. This one is the letter that I just spoke about.

—98—

Q. What is the date of that? A. March 3d. This letter dated March 10th is the letter that I received together with this letter at the same time this contract was enclosed.

Q. You mean to say that these three papers came together enclosed in this letter of March 10th? A. Yes, sir.

Q. Have these papers been retained in the files of this Fresh Grown Preserve Company ever since? A. Yes, sir.

Q. Did you see the letter of March 3d before you received it with the letter of March 10th? A. No, sir.

Q. Will you examine the letter of March 10th, Mr. Greenberg? A. Yes, sir, I have examined it.

Q. Does that refresh your recollection in any way as to whether you saw the other one before? A. I didn't see this letter. I saw a rough draft that was going to be put on his stationery and sent.

Q. Was that the same as this? A. Practically.

Mr. Hull: These letters are offered in evidence.

Mr. Barshay: May I see them, please?

Mr. Hull: And also the agreements.

(Papers are shown to Mr. Barshay.)

Mr. Barshay: May I cross-examine on this point alone with respect to a small item, sir?

Cross-Examination (as to exhibit) by Mr. Barshay:

Q. Did you say you received the three of them together

—99—

in one envelope? A. Yes, sir.

Q. Was it a large envelope or a regular mailing envelope? A. I don't remember, it must have been a large envelope.

Q. Will you look at this agreement which you received in the mail? Do you notice how it is folded? A. Yes, I notice it.

Q. There is one crease. Now, look, at the letter of March 10th. Do you notice how that is folded? A. Yes, sir.

Q. Is that folded in the same shape so that it could be fitted to an envelope of the size that would admit such letter and contract? A. This letter has been handled any number of times since receiving it and there are many more creases in it than there were at the time we received it and I don't know at this moment how it was creased at the time I received it with that letter.

Q. But they are creased horizontally, are they not, just like the contract? A. That's right, the creases are horizontal.

Q. This way (indicating)? A. That's right.

Q. Now, I show you letter March 3, 1943, and you notice how this has been creased? A. The main creases in this are horizontal.

Q. What about the other creases? A. Well, the other creases, the same thing goes for this letter. That has been handled, oh, any number of times, hundreds of times, I cannot—

—100—

Q. I am not trying to trap you, sir. I am just trying to account for the creases the other way.

The Court: Well, it would fit no matter how it was creased.

Mr. Barshay: I am sorry Your Honor has made an observation, with all good intent—I will stop questioning you about it. I was driving at something but it is no longer necessary.

The Court: Well, go ahead. Certainly the mere observation of a physical fact should not defeat your purpose.

Mr. Barshay: Well, it has for the moment, what I had in mind anyway, but it is not material to the main issue. No objection, sir.

The Court: They may be received in evidence.

The Clerk: One exhibit, Mr. Hull?

Mr. Hull: Yes, one exhibit, please.

(Received and marked Exhibit G-4 in evidence.)

Direct Examination by Mr. Hull (Resumed):

Q. Mr. Greenberg, where were you when you saw the rough draft of the March 3d letter that you have told us about? A. I was in Lyndhurst.

The Court: Who showed you the rough draft?

The Witness: It was a draft gotten up by Mr. Sealfon and myself.

—101—

Q. You mean that Sealfon was there on that occasion? A. Yes.

Q. What do you mean when you say, "Gotten up by Sealfon and yourself"? A. After Mr. Sealfon and I had arrived at a deal the both of us got up a draft of how the letter should read that he was going to send me.

Q. And that was out at your place of business? A. That's right.

Mr. Hull: Your Honor, I would like to read the letter to the jury.

(Letter is read to the jury, being letter dated March 10, 1943, on stationery of Sero Syrup Company, 578 Manhattan Avenue, Brooklyn, New York, addressed to Fresh Grown Preserve, Inc., Lyndhurst, New Jersey.)

Mr. Hull: The other letter—

Mr. Barshay: Now I have an objection. Mr. Hull, will you excuse me,—with respect to the letter of March 3d, your Honor, I object to it on the ground heretofore urged without setting it forth in detail that the issue has been determined by a prior jury.

The Court: Well, it was received in evidence, you said no objection.

Mr. Barshay: Well, your Honor, then I pray that you permit me to withdraw that statement and urge it with the objection I am now urging.

—102—

The Court: All right. There will be the same

ruling that I heretofore made and you may have an exception.

Mr. Barshay: I am grateful to you.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Hull: Likewise on the letterhead of Sero Syrup Company, letter dated March 3, 1943, to Fresh Grown Preserves, Inc., Lyndhurst, New Jersey.

(Letter read to the jury.)

Q. What kind of syrup, Mr. Greenberg, were you discussing with Sealfon so far as your sales to him were concerned? A. Imitation vanilla flavored syrup.

Q. Was anything said as to where those syrups were to be delivered when ordered? A. The syrups that I sold to him?

Q. Yes. A. All the syrup was delivered to him at my plant.

Q. Was anything said between you as to the actual destination thereof? A. Yes, sir.

Q. What was that? A. Sealfon told me that the syrups were being sold in his usual commercial circles,—in his usual commercial direction and none of it was going to the Navy.

Q. Did he tell you that before he wrote the letter? A. Yes, sir.

Q. What happened after you received these letters?

The Court: Let me ask you, what discussion did you have, if any, with Sealfon, with reference to this Brooklyn Navy Yard affair and the furnishing of more syrup? How was that to affect you?

The Witness: Well, Mr. Sealfon wanted more syrup than I could sell him and I said to Mr. Sealfon, "I cannot sell you any more syrup than I am presently giving you."

The Court: Why?

The Witness: Because I have a certain quota of sugar and I was contracted to another company for most of it and I had very little.

The Court: And did you tell this to Sealfon?

The Witness: Yes, and I had very little syrup available for general sale and I said—

The Court: Was the syrup made from sugar?

The Witness: Yes.

The Court: Did you discuss that with Sealfon?

The Witness: Yes, and I said, "If you are selling any Government exempt agencies I could give you more syrup and that would be the only way I could do it," and then at a later conversation he said to me, "I am not selling the Navy Yard but I am selling

to a civilian company doing business at the Navy Yard and if I wrote a letter saying that I was selling at the Brooklyn Navy Yard, leaving an inference that I was selling the Navy and not the civilian, could I get the syrup" and for it naturally, he wanted a consideration.

Q. You had to use sugar to make up the syrup? A. Yes, sir, syrup is practically all sugar flavored.

Q. And you said, I think, you discussed that with him, did you not? A. Well, the product we were selling him was sugar flavored with the vanilla extract.

Q. But tell us again in case it has not been made clear—

Mr. Barshay: No, I object to that.

The Court: Well, wait a minute till we see what it is.

Q. What conversation took place between you and Sealfon as to how you were going to use the letter? A. After we had arrived—

Mr. Barshay: It is repetitious, your Honor; that is the only ground of my objection.

The Court: All right, I will sustain the objection.

Q. After you received the letter what did you do with it? A. After I received the letter I turned it over to my brother; he proceeded to take it to the ration board.

Mr. Barshay: I object to that and I move to strike it out.

—105—

The Court: Were you present when he did it?

The Witness: When he went to the ration board?

The Court: Yes.

The Witness: I was present when he left our office to go to the ration board.

The Court: When you gave it to your brother, he left your office, that's all you know about it.

The Witness: That's right.

The Court: Strike the balance from the record.

Mr. Barshay: May I ask your Honor to direct the jury to disregard it?

The Court: Ladies and gentlemen of the jury, so far as the statement that he took it to the ration board is concerned, you will disregard it.

Q. Mr. Greenberg, were you present when any invoices were made out? A. Yes, sir.

Q. Tell us about that. A. When Mr. Sealfon and I had concluded the financial part of our arrangement he asked me what the routine would be with reference to the letter and I said to him—

Mr. Barshay: Well, that is not responsive to the question, your Honor.

The Court: I think it is responsive. Proceed.

Mr. Barshay: Exception.

—106—

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

A. (Continuing) And I said to him that either I or my brother would go to the ration board, procure form 315, would make out the invoices showing that we were selling syrup through Sero Syrup for shipment to the Brooklyn Navy Yard and submit the form 315 with those invoices attached and the letter to the local board in order to secure the replacements for the amounts of syrup shown on those invoices.

Q. Do you know whether invoices were made out in accordance with that suggestion? A. Yes, sir.

Q. For how long a time did that continue? A. A little over a year.

—107—

Q. You never went to the ration board yourself with those applications, did you? A. No, sir.

Q. In each instance can you tell us whether or not you saw the applications and invoices attached before they went there? A. I would say in about 90 percent of the instances.

Q. What name was used on the invoices that you saw? A. The invoices were made out to Sero Syrup Company, Manhattan Avenue, Brooklyn, I don't remember the number, and showed that they were for replacement of materials sent to the Brooklyn Navy Yard.

Q. On the Sero Syrup account? A. Yes, sir.

Q. Where did you get the name or where did your brother get the name, if you know, of the Brooklyn Navy Yard?

Mr. Barshay: I object to what his brother did, sir.

A. I know—

Mr. Hull: Withdraw it.

The Court: Wait a minute. Go ahead; the question is withdrawn.

Q. On the invoices that you saw made out, where did the name come from? A. The name Brooklyn Navy Yard?

Q. Yes, sir. A. It came from the letter sent to us by Sero Syrup.

Q. You said something about an arrangement for payment of two cents a pound. Do you recall that?

The Court: A rebate of two cents a pound.

—108—

A. Yes, sir.

Q Was that arrangement carried out? and if so, how? A. It was carried out by my giving to Mr. Sealfon two cents a pound on all the sugar secured from the local board in person.

Q. On what occasions did you deliver money to him? on account of that arrangement. A. Well, the occasions were periodic; whenever it was convenient for Mr. Sealfon and myself to meet. There was no definite period. It would range anywhere from three days to ten days.

Q. Where did you meet with him in order to do that? A. In New York; in New York City.

Q. How much did you pay him all together as this went on? A. From the beginning to the very end it amounted to about $500,000.

Q. You gave that to Sealfon in cash? A. Yes, sir.

Q. Mr. Greenberg, that didn't cover exclusively, did it, the sugar that you obtained through the use of the names that he furnished? A. That's right, it did not. Two cents—

The Court: What was it supposed to represent?

The Witness: The two cents a pound represented two cents for every pound of sugar that I was to get from the board through any letter because of the idea that had been started in our deal, the idea that he had originated.

Q. Was all of that half a million dollars delivered in

—109—

cash? A. Yes, sir.

Q. Was there any arrangement or discussion about the method in which you would deliver the syrup to him and what, if any, papers would be used? A. I don't understand that, Mr. Hull.

The Court: How was the syrup to be delivered?

The Witness: It was delivered—none of the syrup was delivered; he would pick—all the syrup was picked up at our plant; it was f.o.b. Lyndhurst, New Jersey.

The Court: Picked up by whom?

The Witness: By Mr. Sealfon's truckmen.

Q. What was the name of the truckman? A. Frank Citron and Charles Kranski.

Q. Did you have an arrangement from Sealfon with respect to papers that would be used or would not be used in making deliveries to the truckmen? A. No.

Q. Were invoices delivered between you and Sealfon? A. No, sir.

Q. Was that by arrangement or not? A. Let me qualify that by saying that invoices were delivered to Sealfon at the beginning of our transactions, but after the transactions, as a result of the letter, then no invoices—invoices were no longer delivered.

Q. Was that by arrangement between you and Sealfon? A. Yes, sir.

Q. What was said between you about that? A. What Mr. Sealfon said to me,—when we had completed the arrangement for the rebate of two cents a pound, I said to

Mr. Sealfon that in order for me to be able to pay him the two cents a pound, he would thereafter have to pay me for the syrup in cash, because I had no other means of getting it; and he agreed to that.

Q. I want to know what the arrangement was that I think you referred to whereby papers, invoices, would not be used— A. (No answer.)

The Court: Where there was a cash payment, ordinarily, was there an invoice given?

The Witness: No.

The Court: Is that why there was no invoice given?

The Witness: That's right.

The Court: You had made arrangements for cash payments.

The Witness: I made arrangements for cash payments, because I had to refund to him and therefore I had to have the cash.

Q. Now did you pay Kraemer & Company any commission in connection with these transactions? A. Kraemer & Company were only paid commissions on the sales that were made of syrup that came out of my regular quota, and Kraemer & Company were paid no commissions for the syrups sold to Sero Syrup as a result of any replacements.

Q. The name Brooklyn Navy Yard was not used anywhere except upon application for replacements, is that so? A. Yes, sir.

Q. Did you have a discussion with Sealfon about the payment of commissions or not? A. You mean to Mr. Kraemer?

Q. To anybody. A. We may have had. I don't remember any.

Q. Did you pay Kraemer & Company any commissions after the letter was written?

The Court: He testified that Kraemer got no commissions out of any of the syrup which was the result of replacements.

The Witness: That's right.

Mr. Hull: That's right. I will withdraw my last question. Cross-examine.

Cross-Examination by Mr. Barshay:

Q. Did you testify in the last trial, Mr. Greenberg? A. Yes, sir.

Q. Other than the fact that you received the letter of March 3rd, 1943, you didn't tell any of that story to the Court and jury then, did you? A. No, sir.

Q. Now, Mr. Greenberg, how old are you? A. Forty-seven.

Q. Are you married? A. Yes, sir.

Q. Got children? A. Yes, sir.

Q. How many? A. Two.

—112—

Q. Are you president of a synagogue in Brooklyn? A. Vice president.

Q. Vice president. You are a contributor to that synagogue, are you? A. Yes, sir.

Q. You contribute a large sum of money to it? A. No, sir.

Q. What? A. No, sir.

Q. You are a fairly large contributor. A. I wouldn't say that.

Q. What? A. No, sir.

Q. Your contributions are made in cash? A. No, sir.

Q. By check? A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. You don't want to go to jail, do you, Mr. Greenberg?

The Court: Well, if he said yes, we would have a psychiatrist here to examine him.

Mr. Barshay: I have heard that answer, your Honor, over my period of years.

The Court: Maybe he wants to get away from mama.

Mr. Barshay: Whatever the reason.

Q. Would you lie to save yourself from going to jail? A. No, sir.

Q. You wouldn't? A. I don't think I would.

Q. Well, now, there is a doubt in your mind, isn't there? A. There is.

—113—

Q. You may lie to escape jail or you may not, is that so? A. That's right. I can't tell unless the occasion arose.

Q. But you are pretty close to going to jail right now, aren't you, Mr. Greenberg?

Mr. Hull: I object to that. He doesn't know any such thing, sir.

The Court: I will sustain the objection. You don't know what I am going to do.

Mr. Barshay: No, not what you are going to do.

The Court: You cannot read my mind. Better men than you have tried it.

Mr. Barshay: Your Honor, I want to assure you that I am not in any wise seeking what you will do, but I want to get his mental operation as it affects his testimony, the hopes in his mind, sir.

The Court: You are asking him to read my mind.

Mr. Barshay: No, I am not asking him to do that, sir. I want to try to find out whether or not any hopes that he may entertain by himself—

The Court: Why don't you ask him that?

Mr. Barshay: I will get to it, sir, little by little.

Mr. Hull: I press my objection to the question.

Q. Mr. Greenberg, you pleaded guilty, did you not, on December 11, 1945, before this very Court. A. I did.

—114—

Q. Wait a minute. A. Oh, I am sorry.

Q. To conspiracy to defraud the United States Government; right? A. Yes, sir.

Q. And to commit the offenses against it. A. Yes, sir.

Q. You were out on bail awaiting sentence, were you not? A. I am at the present time.

Q. And this Court is going to sentence you, is that so? A. That's my understanding.

Q. Yes. All right. Thereafter and yesterday morning did you again plead guilty before this very Court to uttering false writings for the purpose of defrauding the

United States Government? Is that so? A. Yes, sir; yes, sir.

Q. And so that's the second indictment to which you pleaded guilty and on which you are awaiting sentence, is that right? A. Yes, sir.

Q. As president of the Fresh Grown Preserve Corporation did you file an income tax return in 1943 and 1944? Did you? A. As president of the corporation?

Q. Yes; and also as personally. A. Yes, sir.

Q. You did that in New York County, did you not, the Third Collection District? A. My personal income tax returns were filed in Brooklyn.

Q. And as an officer of the Fresh Grown Preserve Corporation where did you file your income tax return? A. The 1943, I think the 1943 period the tax was filed in

—115—

Newark, and in 1944 in New York. That's my recollection at the moment.

Q. You swore to that income tax return, did you not? A. Yes, sir.

Q. You know what an oath is. A. Yes, sir.

Q. Mr. Sealfon did not help you prepare that return, did he? A. No, sir.

Q. You did that all of your own volition, is that so? A. Yes, sir; yes, sir.

Q. Isn't it a fact that for the fiscal year commencing June 1, 1943 and ending May 31, 1944, you filed a false income tax return for the corporation, wherein you falsely swore that the income tax of the Fresh Grown Preserve Corporation was only $57,370.97, upon which there was due the Government—

The Court: Now, look! Don't let's go through a recital of the whole thing; let's find out whether this is a proper question. There is an objection on the part of the Government to this question.

Mr. Hull: The objection is this, sir: that I think that this witness has a right to be advised of his rights.

The Court: All right. You don't have to answer that question unless you so desire, on the ground it might tend to incriminate and degrade you. Do you desire to answer the question or do you not?

The Witness: I will answer the question.

The Court: All right.

—116—

Mr. Barshay: May I proceed, your Honor?

The Court: Proceed.

Q. (Continuing) That the income of the corporation was $57,370.97, when in truth and in fact the income of the corporation was $1,182,106.94; isn't that so? A. Will you repeat the first part of the question so I get the continuity of it?

The Court: Did you file a false income tax return for this company in which you said that its income was $57,000 when as a matter of fact it was over a million dollars?

The Witness: I did not.

The Court: Is that substantially your question?

Mr. Barshay: Substantially.

A. I did not.

Q. You did not, you say? A. That's right.

Q. You are awaiting trial in New York, are you not—

Mr. Hull: I think counsel knows better than that.

Mr. Barshay: Wait a minute.

The Court: Now, wait a minute. Don't ask questions which you know are not proper in the hope that an insinuation might be left, Mr. Barshay. I don't think that's fair.

Mr. Barshay: I am not, Judge. He stopped me in the middle of the question. The whole question would be absolutely proper. I will state it to you

—117—

at the bar.

The Court: All right, submit it to me at the bar.

Mr. Barshay (At side bar): The rest of the question would be—

The Court: State the whole question.

Mr. Barshay: All right. "You are awaiting trial on that indictment now, sir, and did you not seek to arrange with the Government counsel to plead guilty to that indictment for the purpose of obtaining a concurring sentence in this jurisdiction where you are awaiting sentence in this court?"

The Court: No, no. That is patently unfair. You may have an exception to that ruling.

Mr. Barshay: All right.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Mr. Hull: Nothing but convictions are allowed.

Mr. Barshay: Oh, no, we are allowed to ask him questions on moral turpitude.

The Court: What?

Mr. Barshay: I am allowed to ask him questions on moral turpitude.

The Court: Yes, but I won't allow that question. You may have an exception.

—118—

(Counsel withdrew from the bench.)

Q. Did you keep false books in your corporation? A. I didn't keep any of the books.

Q. And you kept no books whatever?

The Court: He said he didn't keep any of the books.

A. The books were not under my supervision.

Q. You mean you were not the bookkeeper, is that right? A. That's right.

Q. But you knew your corporation had books of accounts. A. Yes, sir.

Q. And they were under your supervision? A. No, sir.

Q. Didn't you handle the income, sir, of your corporation? A. I was one of the persons handling the income, but I had nothing to do with the books.

Q. Well, did you transmit the income for recording in your books? A. Did I what?

—119—

Q. Did you transmit the information with respect to the

income so that it could be recorded correctly in your books? A. Yes, sir.

Q. You did? A. I don't know what you mean by transmit. In the ordinary—

Q. In other words, if you received a check belonging to the Fresh Grown Preserve Corporation did you cause it to be entered in the corporate books? A. Yes, sir.

Q. On every occasion, sir? A. On every occasion I would cause it to be entered. Whether or not it was entered I wouldn't know.

The Court: But as to any receipts that you personally got, the information concerning those you gave to the bookkeeper?

The Witness: That's right.

Q. You did that yourself? A. I say I was one of the persons that did it.

Q. Well, at the times that you received moneys, I ask you now, did you divert any to your own pocket? A. No.

Q. Do you know the firm of Greenhouse &— A. And Brandt?

Q. Do you know the firm, Greenhouse & Brandt? A. I do.

Q. A professional check-cashing agency in New York? A. Yes.

—120—

Q. Did you on February 8, 1943, take a check made out to the firm of Fresh Grown Preserve Company from the

Royal Crown of Boston, Inc., in the sum of $1984.32 and cash it with that check-cashing agency? Did you? A. I probably did. It sounds similar to one I did.

Q. Did you take the money and put it in your pocket? A. No, sir.

Q. Did you fail to record it in your books? A. No, sir.

Q. You know corporate checks are to be deposited, under the law, in the corporate accounts. A. I know nothing of the kind.

Q. Did you do that as a practice, sir, with this same check-cashing concern? A. We did a fair amount of it.

Q. Well, on March 3, 1943, did the Nehi Beverage Corporation make out a check to the Fresh Grown Preserve Company and did you cash that in the sum of $2,124.32, with that check-cashing agency? A. The Nehi Corporation of where?

Q. The Nehi Corporation of Cincinnati. A. Yes, sir.

Q. And on April 30, 1943, did you take a check to that same check-cashing concern, cash it, it being made to the order of the Fresh Grown Preserve Corporation in the sum of $450, from the Fall River & New Bedford Bottling Works? A. I haven't got that list in front of me but I did take a number of checks and what you are reading sounds like the checks I took.

Q. And on May 7, 1943, at the same agency did you cash a check made out to the Fresh Grown Preserve Corporation dated April 10, 1943, with the same check-cashing concern, in the sum of $1,050? A. Made by whom? There are different companies there, and—

Q. Well, do you want to look at the list yourself, sir? Will that be easier? A. Well, I am willing to—

The Court: You cashed a number of checks made out to the corporation, with this company?

The Witness: I am saying that—

The Court: What did you do with the proceeds of the checks?

The Witness: The proceeds of the checks, the proceeds of those checks, were used in the furtherance of the business of the Fresh Grown Preserve Corporation.

Q. Did you account for it in your income tax return? That is what I am asking you. A. Yes, sir.

Q. Now, did you keep books, did your company keep correct books, of every sale that your corporation made to the Sero Syrup, or to any other places? A. I wouldn't know.

Q. You wouldn't know that? A. No, sir, I wouldn't keep the books.

Q. Did you take an account of your income and your disbursements as president of this corporation? Did you? A. I probably knew, discussed them or knew them.

—122—

Q. Well, yours was a very large concern, was it not? A. Fairly large.

Q. From the Sero Syrup Company, of which this defendant was the owner, you received $1,257,201.73, isn't that so? A. I wouldn't know.

Q. You wouldn't know that? A. No, I wouldn't know offhand.

Q. Well, you sold to him 1,590,459 gallons. A. I wouldn't know that either, offhand, without some reference to records.

Q. Didn't you prepare yourself before you came to court? A. I did to the best of my ability.

Q. And these figures are strange to you? A. No. You mention an exact figure.

Q. Approximately. A. Approximately you are right.

Q. All right. Now do you know now, can you tell whether or not, you recorded on your books the receipt of $1,256,231, approximately? Approximately. A. Well,—

The Court: Let's ask do you know whether or not it was recorded? Whether he recorded it or not.

Mr. Barshay: Yes.

Q. Do you know whether or not it was recorded? A. I do not know.

The Court: Well, who had charge of that?

The Witness: My brother.

—123—

Q. Your brother Leo? A. Yes, sir.

Q. Who was in court here, is that so? A. (The witness nodded affirmatively.)

Q. Now, in 1942, in the State of New Jersey, did you and your brother Leo conspire to suborn perjury in the Chancery Court of the State of New Jersey?

Mr. Hull: I wonder if he is asking about convictions?

Mr. Barshay: No, I am not, sir. I submit I have

a right to ask any act of moral turpitude for which he has been convicted or not.

The Court: No, you may ask him if he has been convicted.

Mr. Barshay: No, sir, I can't ask him that, because I know that isn't the fact, sir, but I submit and I urge the Court—

The Court: Well, you are asking him to make a legal determination.

Mr. Barshay: No.

The Court: You are asking him to define whether or not he is guilty of conspiracy.

Mr. Barshay: No, I am not, sir.

The Court: Certainly, you are.

Mr. Barshay: I am asking him whether or not he and his brother conspired.

The Court: Conspired, exactly.

—124—

Mr. Barshay: Yes; and not as a conclusion of law.

The Court: As a criminal violation.

Mr. Barshay: Not as a conclusion of law, your Honor, but as a fact.

The Court: I won't allow it. You may have an exception.

Mr. Barshay: I respectfully except.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. Now, for the year 1942 did you as an officer of the corporation make a false income tax return for your corporation in the State of New Jersey? Did you? A. In 1942?

Q. Yes, from '42 to '43. A. In the State of New York?

Q. In the State of New York, or anywhere, sir. A. No, sir.

Q. Did you testify before the Grand Jury?

Mr. Hull: What Grand Jury?

Mr. Barshay: In this case, sir.

A. No, sir.

Q. Or in the conspiracy case? A. No, sir.

Q. Did you testify before any Grand Jury against Robert Sealfon? A. No, sir.

Q. Did you ever make a statement to the District Attorney with a stenographer present in this case or in a

—125—

conspiracy case? A. Yes, sir.

Q. Did you read it after you made it? A. Yes, sir.

Mr. Barshay: I call upon the District Attorney through the Court to produce for the Court that statement.

Mr. Hull: Well, the first question is what the purpose of the request is.

Mr. Barshay: Yes, I will give it.

Mr. Hull: And the second question is what statement is he talking about?

The Court: Well, he says that he made a statement to you or to the United States Attorney with a stenographer present.

Mr. Hull: Yes.

The Court: What is the purpose of calling for it?

Mr. Barshay: So that your Honor can see whether or not, at the conclusion of his testimony, there are any inconsistencies in that statement as distinguished from his testimony here; and if your Honor so finds, at that time I shall ask the privilege to look at it for the purpose of cross-examining this witness.

The Court: All right, you proceed with your examination; I will deal with that later.

Q. Did you make but one statement, sir, or more than one? A. I made one statement in this case and I made one statement in the conspiracy case.

—126—

Q. Did you read both of them? A. Yes, sir.

Q. Now, did you make a statement to any other officer of the Government wherein a stenographer was present? A. With reference to Mr. Sealfon?

Q. Yes. A. Not that I know of.

Q. Can you give me the dates when you made each of those statements? A. The statement in the conspiracy case was made somewhere between December 11 and December 14, 1945, and the statement in this case was made on January 7, 1946.

Q. Is that the first statement you made, referring to the first one between December 11th, in this case, to anyone? other than your own counsel, of course. A. In this case?

Q. In this case or the conspiracy case. A. The state-

ment—the questioning took place on Friday, Thursday or Friday of last week; I don't remember—

The Court: No, was the statement you made between December 11th and the 14th the first statement you made to anyone, either about this case or the conspiracy case?

The Witness: Yes, sir; except my attorneys.

Mr. Barshay: That's right.

The Court: Except your attorneys.

Q. Now, prior to that time, prior to December 11, 1945 you made no statement of any kind to either Grand Jury, District Attorney or OPA officer or anyone else, is that so? A. With reference to the—

—127—

Q. This case; that's what I am talking about. A. Yes, that's right.

Q. Or the conspiracy case. A. That's right.

Q. So that the first statement you made was after you pleaded guilty and were awaiting the sentence of the Court. A. With reference to that case.

Q. I am talking about— A. That's right.

Q. —the conspiracy case and this case. A. That's right.

Q. You understand me clearly now, don't you? A. That's right.

Q. In other words, you offered yourself as a Government's witness, is that so? A. Why, I imagine that's the way you would put it.

Q. And you hope to get some reward for your testimony, do you not? A. I don't think—well, I wouldn't say; I don't know how to answer that question.

Q. Mind you, I am not saying anyone promised you anything, Mr. Greenberg; I am merely asking you whether or not, having turned Government's witness in both cases, having pleaded to both indictments, and awaiting sentence on each, do you hope in your own mind for some reward for doing that?

Mr. Hull: Just a moment. The characterization about turning Government's witness in both cases is inaccurate. I object to it.

The Court: Well, he is, as a matter of fact, a

—128—

Government witness, and I think we know just what Mr. Barshay is driving at.

Mr. Hull: In this case, sir; my objection is to both cases.

The Court: All right, he is now a Government witness.

Mr. Barshay: He was in the first case—

The Court: Well, he was, but let us be perfectly frank about that and say that in the other case the only question he was asked was about the activity of the corporation, nothing whatsoever about his personal activities; at that time no other questions were asked either by the Government or by you.

Mr. Barshay: What I am trying to urge, your Honor, is that the Government—

The Court: Well, now, the question is here you are a Government witness and you have pleaded guilty to both indictments and counsel wants to know whether you do that with any hope of leniency.

The Witness: Well, the true answer would be no, sir.

Q. Did you have your counsel make an effort to obtain leniency for your testimony?

The Court: What was that?

Q. Did you have counsel, your counsel, make an effort to gain leniency—

—129—

Mr. Barshay: I didn't say succeed, sir, mind you. I don't want either to impugn—

The Court: Well, I will say that I will be the sentencing Judge.

Mr. Barshay: I know that, Judge.

The Court: You may ask him whether he asked his counsel to do it, because if you want to know whether they did or not I will pretty soon tell you.

Mr. Barshay: Judge, I wouldn't go that far.

The Court. All right.

Mr. Barshay: I know the limits of my cross-examination on that point.

The Court: Well, do you want me to tell you whether they did approach me or not?

Mr. Barshay: No, Judge.

The Court: I will tell you.

Mr. Barshay: I want to know what he requested the Government to do.

The Court: Did you approach the Government to request leniency for you?

The Witness: No, sir.

The Court: I think we will recess now. I have a motion to hear. We will recess now until tomorrow morning at ten o'clock.

—130—

Mr. Barshay: All right, that will be fine.

The Court: The jury will be excused first.

Now, ladies and gentlemen of the Jury, I want to warn you that you must not discuss this case with anyone nor shall you permit anyone to discuss it with you, and if anyone attempts to discuss it with you, you will bring that to the attention of the Court.

We will recess now until ten o'clock tomorrow morning.

(Adjourned to Thursday, January 10, 1946, at 10:00 A. M.)

—131—

Newark, N. J., Thursday, January 10, 1946.

(Trial resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: Mr. Greenberg was on the stand. Will you resume the stand, please?

Murray Greenberg, resumed.

The Court: I think you were cross-examining, weren't you, sir?

Mr. Barshay: Yes.

The Court: Very well, you may proceed.

Murray Greenberg—for Government—Cross

Cross-Examination by Mr. Barshay (Continued):

Q. Mr. Greenberg, yesterday you said that the scheme to issue the letter was originated by Mr. Sealfon; is that so? A. Yes.

The Court: Well, now, you are asking him to— That is not my recollection of his testimony

The Witness: Yes, sir.

The Court: You said there was a scheme to do this. He said as to certain facts. You are asking him now to draw a conclusion. You see, you used the word "scheme." The word "scheme" was not used, as I recall it, by this defendant.

The Witness: No, sir.

Mr. Barshay: Of course, I don't know whether it was or not, but I thought I had the right to use the word, sir.

The Court: Yes, but you are asking him to denominate it as a scheme, and you asked him if he didn't testify to that. Now it may be that that's your construction of his testimony, but I think that it would be better not to use the word "scheme."

Mr. Barshay: Would your Honor permit me to use some other word?

The Court: Well, you may ask him if he didn't testify that it was Mr. Sealfon who first suggested the use of the letter. That avoids any conclusion at all.

Mr. Barshay: Would your Honor give me a re-

spectful exception to that? I had something in mind.

The Court: I know you did.

Mr. Barshay: Yes.

The Court: I know you did.

Mr. Barshay: To lay my foundation, sir.

The Court: Yes, I know you did, but the witness did not use the language which you quoted.

Mr. Barshay: I didn't intend to say that he did.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. Mr. Greenberg, prior to that time did you file any applications with the ration board at Rutherford, New Jersey, containing false invoices? A. No, sir.

—133—

Q. Did you cause them to be filed with the Rutherford Ration Board on behalf of your corporation? A. No, sir.

Q. Did anybody on behalf of your corporation to your knowledge do that? A. No, sir.

Q. Were you in court during the last trial, Mr. Greenberg? A. Yes, sir.

Q. Did you hear the testimony offered by the Government, about the Pan-Continental Corporation, the American-African Export Corporation, the Puretest Products Corporation? Did you? A. I believe I did.

Q. Do you recollect that testimony? A. For the most part.

Q. Did you hear the lady from the ration board testify and produce to this Court records filed by your corpora-

tion, signed by your brother, with respect to them? A. I don't think—I may have escaped that; I don't remember being in the court room at that time.

Mr. Barshay: May I call upon the Prosecutor, please, to let me have those applications?

Mr. Hull: As Mr. Barshay knows, we have sent for them at his request.

Mr. Barshay: Yes.

Mr. Hull: They will be here in a minute.

Mr. Barshay: All right. While we are waiting for that, sir, may I go to another subject?

—134—

The Court: Yes.

Mr. Barshay: And I will come back to this one.

The Court: Yes.

Q. Yesterday I asked you if you filed a false income tax return. I want to reframe the question so that you understand me, Mr. Greenberg. You were treasurer of this concern, were you not? A. Yes.

Q. As treasurer that gave you an authority to sign checks and have custody of the books. A. I know that.

Q. Did you ever see books— A. I wouldn't know whether my being treasurer would give me any more rights than my being president.

Q. Do you know what the word "treasurer" means? A. Yes.

Q. A person who has charge over the funds of the corporation, isn't that so? A. A treasurer has charge over the funds, but may not be actually the custodian of the funds.

Q. Did your corporation keep books at all? A. Yes, sir.

Q. Do you know where they are now? A. I know where they should be.

Q. Where? A. In Lyndhurst.

Q. Is the corporation there now? A. Yes.

Q. Actually going? A. We are not doing very much.

Q. I didn't ask that; but is it a going concern? A. Yes.

Q. Are the same books there now that were in existence in 1943 and '44? A. Yes, sir.

—135—

Q. Do they include all the transactions of all business done by your corporation with Sealfon, Royal Crown, the Baron, and every other corporation? A. They should.

Q. Could you produce them, Mr. Greenberg? A. Could I produce them?

Q. Yes. A. That's a question I would like to discuss with my attorney.

The Court: They are there and if you want them you know how to get them.

Mr. Barshay: All right.

Q. Did you ever look the books of the corporation over? A. Oh, occasionally.

Q. Did you record or did you have recorded in your corporation the amount of business done with Sealfon throughout the year and a half you did business with him? A. I wouldn't know that.

Q. You wouldn't know that either. Would you know whether or not they revealed the transactions done with the Royal Crown Corporation of Baltimore or Washington? A. I wouldn't know whether they record every transaction, at this moment.

Q. Would you know whether or not they record the transactions with Baron?

The Court: Well, wouldn't the books themselves speak for themselves? He has testified that he was not the bookkeeper and that he doesn't know what

—136—

was put in the books, of his own knowledge.

Mr. Barshay: I had hoped for a little latitude, sir, with a principal witness.

The Court: Well, you are asking for so much latitude; you are trying three or four cases in one. Now I have given you a great deal of latitude, I believe, but I don't want to stretch this endlessly. He has testified and has already said several times that he does not know of his own knowledge what actually went into the books, that the information was there. Now whether it was put into the books or not, he has testified he doesn't know. If you want the books you may subpoena them.

Mr. Barshay: I had an idea, your Honor, that I had a right not to be bound by any answers that he makes, and attack his credibility on that very point.

The Court: Well, he has testified to the fact, he has several times repeated that he does not know whether or not these transactions actually were entered. Now you have cross examined him on that and he has repeated it.

Q. Mr. Greenberg, all the transactions with Citron, the

truck driver, on behalf of Mr. Sealfon, were handled by you to a large degree, weren't they? A. No, sir.

Q. Were they handled to the largest degree by you? A.

—137—

Well, that would be hard to say. They were handled by my brother and by myself. As to what proportion I handled and what proportion he handled, it would be difficult to answer.

Q. Well, the first series of transactions that you had with Mr. Sealfon, do you recall whether you got cash or checks? A. In the first series of transactions we had with Mr. Sealfon, it is my recollection that we got checks.

Q. They were certified checks, were they not? A. Some of them were.

Q. Well, the first series of them, weren't they all certified checks, on your insistence? A. I would say that's correct.

Q. Mr. Citron, with the exception of the first two, brought them over to you, did he not, at the plant, when you gave him the syrup? A. I would say that's correct.

Q. And he brought them in envelopes, did he not? A. I wouldn't say that, I wouldn't remember how he brought them.

Q. You wouldn't deny it, would you? A. No, I wouldn't deny it and I wouldn't affirm it.

Q. The very first transaction you had with Mr. Sealfon was handled personally by himself at your place of business, was it not? A. That may well be.

Q. Do you recollect whether Robert Sealfon brought over two certified checks on the 15th of January, 1943, made

—138—

out to his own order and handed them, endorsed them over to you? Do you? A. I don't remember.

Q. Will you look at the instruments in front of you now and see if that refreshes your recollection? A. That's correct. These checks—I wouldn't remember how we got them, but these checks were given to us. Whether they were given to us by Mr. Sealfon or whether they were given to us by Mr. Citron I don't remember at this moment; but these checks were received by Fresh Grown.

Q. Mr. Greenberg, Mr. Citron was not the truck driver on that day, was he? A. I don't remember that either.

Q. You have no recollection of that? A. No.

Q. You said after the letter the transactions changed into cash, is that correct? A. That's right.

Q. In other words, the letter of March 3rd, 1943, changed the transactions from certified checks to cash? A. For the most part; that's my impression.

Q. Well, that was because you said you had to give a rebate to Mr. Sealfon. A. That's right.

Q. And you wanted cash, is that true? A. That's right. There may have been occasional transactions after that by check; I don't remember at the moment.

Q. Well, I show you a certified check to the order of Fresh Grown Preserve Corporation dated March 3rd, 1943, and ask you if you recognize it as being received by you. A. Yes.

—139—

Q. One for March 8, 1943, and one for March 10, 1943, both certified, and ask you the same question. A. These were both received by Fresh Grown.

Q. Both certified, right? A. Yes.

Q. I show you a certified check to the same order dated March 12, 1943, and ask you whether or not your company received the proceeds of that. A. Yes, sir.

Q. And one for March 16, also certified, made to the order of your company. A. Yes, sir.

Q. And one for March 17, certified, to the order of your company. A. Yes, sir.

Q. One for March 22, certified, to the order of your company. A. Yes, sir.

Q. And one for March 25, certified, to the order of your company. A. Yes, sir.

Q. And one for March 26, certified, to the order of your company. A. Yes, sir.

Q. One for March 31, certified, to the order of your company. A. Yes, sir.

Q. One for April 3, certified, to the order of your company. A. Yes, sir.

Q. One for April 6, certified, to the order of your company. A. Yes, sir.

Q. One for April 10, certified, to the order of your company. A. Yes, sir.

—140—

Q. One for April 13, 1943, certified, to the order of your company. A. Yes, sir.

Q. One for April 17, certified, to the order of your company. A. Yes, sir.

Q. Is that so? A. That's right.

Q. April 20, certified, to the order of your company. A. Yes, sir.

Q. April 23, certified, to the order of your company. A. Yes, sir.

Q. April 26, certified, to the order of your company. A. Yes, sir.

Q. May 3rd, certified, to the order of your company. A. Yes, sir.

Q. Now to each of these checks that I have handed to you there is a memoranda indicating a sale of the products mentioned therein, on the letterhead of the Fresh Grown Preserve Corporation. A. That's right.

Mr. Barshay: May we mark these for identification, your Honor?

The Court: Mark them for identification as one exhibit.

(Marked Exhibit D-2 for identification.)

Q. Each of these checks is in the total of $1050, is it not? A. That I will have to look again.

Q. Or if there are any exceptions, please call it to my

attention. Look briefly. A. There are two here that are for different amounts.

Q. Will you read the amounts, please, and the dates? A. March 8, $855, and March 10, $895.

Q. The rest are $1050? A. That's right.

Q. Which indicates that a similar amount of merchandise at that price was sold? A. That's right.

Q. I show you again the three checks, or rather, five checks, all certified, made out to the order of your corpo-

ration, the first dated January 15, 1943, the second January 15, 1943, six hundred and fifty each, and ask you whether or not your corporation received them. A. Yes. These are the checks I just looked at.

Q. Yes, I said that, Mr. Greenberg. A. Yes.

Q. And two checks dated February 17 and February 25, respectively, for twenty-seven fifty, and seven hundred and seventeen fifteen, and ask you whether your corporation received them. A. Yes.

Q. And one for February 26, and ask you whether this certified check was received by your corporation. A. Yes.

Q. And to each of these are attached invoices or memos indicating that they were on the firm's stationery, showing delivery of the merchandise. A. That's right.

Mr. Barshay: I offer them separately for identification, your Honor.

—142—

The Court: Mark them for identification.

(Marked D-3 for identification.)

Q. Wasn't it you who said to Citron, the truck driver of Sealfon, who received either himself and together with his partner all the syrups from your plant on behalf of Sealfon, wasn't it true you said to him, "I want cash, no more certified checks or checks of any kind"? A. That's not so. All my conversations of an executive nature were with Mr. Sealfon. The only conversations I had with Mr. Citron—

Q. You said that's not so, did you? A. That's right; with reference to the trucking, that's all.

Q. Please don't volunteer for the moment. A. O. K.

Mr. Hull: May I see those checks that you are examining?

Mr. Barshay: Yes, sure.

Q. I show you two certified checks, one dated May 10 and one dated May 15, each for $1050, and ask you whether or not they were received by your corporation. A. Yes, sir.

Mr. Barshay: I ask your Honor's permission to mark these for identification.

(Marked Exhibit D-4 for identification.)

Q. Mr. Greenberg, isn't it a fact that outside of these checks that I have shown to you, with maybe one or two other exceptions, I don't know, all the rest of the money paid by the Sealfon Company to you was in cash? A. Probably so.

Q. You did a total business of $1,256,231.72 with Sealfon, did you not? A. Approximately; I don't know the exact figure.

Q. Well, that's approximately, isn't that so? A. (The witness nodded affirmatively.)

Q. And outside of these certified checks which total approximately about twenty-seven, or in round figures, thirty thousand dollars, all of the rest of the money was by cash? A. Probably; approximately that's correct.

Q. Now I ask you as treasurer of the company did you

deposit that cash to the account of the Fresh Grown Corporation? A. Some of it.

Q. What? A. Some of it.

Q. And some of it you kept yourself? A. No, sir.

The Court: What did you do with it?

The Witness: Some of it was returned to Sealfon; some of it was deposited in the bank.

Q. Now you said you had an arrangement with Mr. Sealfon whereby he was to get a rebate of two cents. A. That's right.

Q. And over a million and a quarter of moneys that he paid to you was in cash, is that correct? A. That's not correct.

Q. You just said so. A. I said—well,—

Q. Less than $30,000 in certified checks; the rest was cash, you said. A. Approximately.

—144—

Q. All right. A. I don't remember the figure.

Q. Mr. Sealfon, Mr. Greenberg, didn't suggest to you that he take off the two cents and give you the remainder? A. Mr. Sealfon specifically didn't want it done that way.

Q. In other words, he asked you— First, he should give you the cash, is that correct? A. Not he; Mr. Citron.

Q. Well, that's his truck driver who obtained merchandise— A. Well, that was part—that was part of the way it operated.

Q. Let me ask you this, Mr. Greenberg: At the time he spoke to you about the letter there was no word of Citron at all? A. Probably not.

Q. He couldn't tell you at that point that Citron was

the man to whom the money would be paid, could he? A. It was told to me at a subsequent conversation. There were quite a number of conversations, Mr. Barshay, and it is not easy—

Q. Yes. And we are trying to get the basis of the first conversation, Mr. Greenberg. A. It is not easy to distinguish one from the other.

Q. All right. It was just as easy for Sealfon to retain the two cents and give you the difference, isn't that so? A. No, sir.

Q. You didn't give him any receipts for the cash that he gave you, did you? A. No, sir.

Q. You gave Citron no receipts. A. No, sir.

—145—

Q. You gave nobody any receipts. A. No, sir.

Q. It is of no consequence then whether he sent you two cents less per pound of sugar or not, isn't that so? A. That's not so. It is of great consequence.

Q. In other words, you wanted him to send you a million and a quarter of cash, then you wanted to give him back some cash for himself, is that so?

The Court: What did he ask you to do?

The Witness: Well, what we did was this: Citron gave me the money for the deliveries and then I gave Mr. Sealfon the two cents.

Q. You gave him no receipts of any kind whatever—to Citron. A. No, sir.

Q. You gave—

The Court: Did you have any arrangement with Sealfon as to why the money should be paid in full and then the two cents rebate paid, instead of his deducting the two cents?

The Witness: Yes, sir.

The Court: What was the arrangement you made with Sealfon?

The Witness: The arrangement for that was that the least amount of people would know about the two cents; and it wasn't necessary for his truck man to know about it.

Q. Well, can you tell me how his truck man— A. And—

—146—

Q. Please. Can you tell me how his truck man would know—

Mr. Hull: I submit that the answer was not complete, your Honor.

Q. All right; you complete it; go ahead. A. And M. Citron paying me less two cents would bring the price down to such a point where it would be evident that there was something being deducted.

Q. Well, it would be evident if you returned a half a million dollars, wouldn't it? It would reveal itself in your books, wouldn't it? A. It does.

Q. Well, then, it would be evident in your books or in his books. What would the difference be? A. The idea was that it should be evident only to me, to myself and Mr. Sealfon.

Q. But you said you didn't keep the books, your bookkeeper kept the books; so your bookkeeper would know. A. That's right.

Q. Well, if your bookkeeper could know, Mr. Citron could know just as well, couldn't he? A. No, sir. My bookkeeper was Mr. Greenberg, my brother, who was a participant.

Q. A participant in what? A. In the profits, in the idea and everything that related to Fresh Grown.

Q. Your brother didn't talk to Mr. Sealfon about the idea; only you. A. Well, my—at the first conversation;

—147—

but at some of the conversations my brother was present.

Q. Now how did you accumulate this money, this half million dollars? A. It was never accumulated.

—148—

Q. Well, half a million dollars, did you keep it from time to time in any particular place? A. Yes.

Q. How much at a time did you give Mr. Sealfon? A. I wouldn't know offhand now.

Q. Well, give us your best recollection. A. Well, my best recollection would be that he got varying amounts, anywhere up to ten thousand dollars.

Q. All at once? A. That's right.

Q. In paper money? A. Yes, sir.

Q. In large bills? A. In the same kind of bills that he gave me, $100 bills.

Q. In other words, the identical money that he sent over to you for which you gave no receipt, you put aside and you brought it back to him three or four days later? A. For the most part that is what happened.

Q. Now, was it large bills or small bills, do you know? A. Well, they were different denominations.

Q. Well, did you make them up? A. Did I make up the bills?

Q. Yes. Did you make up the denominations, five dollars, ten dollars, twenty dollars? A. No, not the denominations, I didn't make them up; I counted out the amount of money at times that I was supposed to give him; is that what you mean?

Q. How did you arrive at this specific amount on each occasion? A. Well, Sealfon got two cents—let me put it

this way: The ration certificates were procured from the board every week.

Q. You didn't show that to him, did you? A. No.

Q. Mr. Sealfon never went to the ration board with you, did he? A. Mr. Sealfon never went to the ration board with me.

Q. Mr. Sealfon, to your knowledge, never went to the ration board with your brother, did he? A. To my knowledge he never went to the ration board with my brother.

Q. And to your knowledge he never went to the ration board at all?

Mr. Hull: I don't suppose he would know that.

A. Well, I wouldn't—

Q. All right. Well, he didn't go with you and he didn't go with your brother? A. That's right.

Q. Did you bring back the certificates and show Sealfon that the ration board gave to you on each occasion? A.

The ration board never gave them to me. My brother took care of all that.

Q. Did your brother give them to you? A. No.

Q. And you didn't show them to Sealfon? A. No.

Q. Then there was no way for Sealfon to know— A. Except that there may have been an occasion when Sealfon was in our office he did see something like it.

Q. Well, as the Court said, we won't speculate. I ask

—150—

you did you ever show to Sealfon the certificates issued to you or to your brother, who turned them over to you, by the ration board? A. My answer is this—

The Court: No, did you ever show them to him?

The Witness: I may have, your Honor, because he was in our office many times.

The Court: What is your best recollection? Did you or didn't you?

The Witness: My best recollection is it is very possible.

The Court: No, I am not talking about possibilities; we are not talking about possibilities; I am talking about your best recollection of the facts.

The Witness: My best recollection of the fact is that Mr. Sealfon at some time or other did see the certificates.

Q. I asked you did you show it to him, not did he see it; did you show it to him?

The Court: Were you present when he saw it?

The Witness: Yes, sir.

Q. Can you give me the date? A. I cannot.

Q. Can you give me the time? A. I cannot.

Q. Can you give me the month? A. I cannot.

Q. Can you give me a specific ration certificate? A. I cannot.

—151—

Q. Can you give me the occasion? A. I cannot.

Q. Can you say whether it was more than one occasion? A. I cannot.

Q. You obtained twenty-five million pounds of sugar, did you not, from the ration board? A. Obtained more than that.

Q. I am talking about over your basic quota. A. That is approximately correct.

Q. Approximately correct. Did you ever have an accounting with Mr. Sealfon indicating to him that you obtained twenty-five million pounds of sugar, and therefore he was entitled to two cents a pound? A. No accounting was necessary; he was getting—

Q. No, did you ever have such an accounting? A. No, sir.

Q. There was no way by which Sealfon had access to the ration board to check the amount of sugar allowed to you above your basic quota, was there? A. No, sir.

Q. So that Sealfon had to rely on you? A. That is correct.

Q. Is that so? A. Yes, sir.

The Court: How much did you pay him at this two cent rate?

The Witness: Approximately $500,000.

The Court: Was that on all of the twenty-five million pounds?

The Witness: That is correct, sir.

—152—

Q. So that if you had said you had only obtained from the ration board twelve million pounds there was no way for Sealfon to check up? A. That is correct.

Q. Now, you had sold to Sealfon about ten million pounds of sugar in the form of vanilla flavored syrup, is that correct? A. That is correct.

Q. You had fifteen million pounds left for yourself? A. That is correct.

Q. And that you sold to some other people, did you not? A. Yes, sir.

Q. Did you sell it to bootleggers? A. No, sir.

Q. Who did you sell it to? A. It was sold in the beverage industry.

Q. Whom did you sell it to? A. Do you want me to mention the individual names?

Q. Well, give us some, if you don't mind. A. Royal Crown Bottling Company of Washington; Royal Crown Bottling Company of Baltimore; Royal Crown Bottling Company of Boston; Royal Crown Bottling Company of Newark; Nehi Bottling Company of Cincinnati; Nehi Company of Chicago; Nehi Company of Scranton; Nehi Company of Columbus, Georgia.

Q. And to the S. J. Barron Corporation? A. And to S. J. Barron Corporation.

Q. And others? A. Yes.

Q. Mr. Sealfon had nothing to do with the sale of any

of these items to any of those corporations, did he? A. No, sir.

Q. You didn't tell him about it, did you? A. No, sir.

Q. It was not his concern what you did with the fifteen million pounds of sugar, is that correct? A. That's right.

Q. Now we will go to the Royal Crown Bottling Company of Baltimore and Washington. Mr. Greenberg, did you get a letter from them similar in content to that which you got from Sealfon? A. I got a letter from the Royal Crown Bottling Company of Baltimore.

Q. Did you get a letter from S. J. Barron Corporation? A. Yes, sir.

Mr. Hull: I wonder what the materiality of that is, your Honor. I would like to know the purpose.

The Court: It has been answered. Let's see if there are any further questions along that line.

Q. Sealfon had nothing to do with getting the letter from Royal or Barron through you, did he? A. He didn't have anything to do with my getting the letter, but the idea—

Q. Now, please. A. Well, let me answer the question in full.

Q. I know you are a very clever man, Mr. Greenberg. I want to ask you a question to which you will give an answer and then Mr. Hull will take you.

Mr. Hull: I think Mr. Greenberg's answers are

thoroughly responsive.

The Court: I don't think we can take just arbitrarily your idea of an answer. If the witness desires to answer fully and it is material, he should be allowed to do it.

Mr. Barshay: To a fact, yes, your Honor, but an idea is another thing. It is a conclusion, a man's thought or impression.

The Court: True, but if you are going to shut him off—

Mr. Barshay: I wouldn't but he used the word "idea".

The Court: Well, don't shut me off, please.

Mr. Barshay: I didn't intend that. I beg your pardon.

The Court: Proceed.

Q. You didn't tell Mr. Sealfon that you were going to go to the Royal Crown and ask for a letter, did you? A. No.

Q. You didn't tell Mr. Sealfon that you were going to the Barron Corporation and ask for a letter, did you? A. The correct answer to those both questions would be I don't remember.

Q. Well, you just said no. A. Well, on thinking over it I don't remember whether I did or not.

Q. You had the Royal Crown mention in its letter exempt agencies, did you not?

—155—

Mr. Hull: I object.

A. Yes, sir.

The Court: It has been answered. If you object to this line of questions let's have it out now. You

are objecting to this line of testimony about Royal Crown and the others mentioned on what ground?

Mr. Hull: Well, what I asked counsel to do, sir, was to state his purpose in asking the questions so that I could tell better whether to object or not.

The Court: What is your purpose?

Mr. Barshay: I am attacking his credibility with respect to his story about this letter to show that he did it on other occasions with other people totally unconnected with Robert Sealfon.

The Court: You put me in a very embarrassing situation now, Mr. Barshay. I don't want to make a comment that you are inviting something but I shall permit this witness to reply fully if you proceed with that line of questions. Now ask your question. The last question has been answered. Counsel has asked for your purpose in this line of questions. You say you want to test his credibility.

Mr. Barshay: Yes.

The Court: All right, now proceed.

Mr. Hull: I assume that he is going to be able

—156—

to refute anything that he asks about.

The Court: Well, I think that probably would be a necessary conclusion.

Mr. Barshay (To Mr. Hull): Have you got those papers now, Mr. Hull?

Mr. Hull: Yes, sir.

Mr. Barshay: May I have them?

(Papers are handed to counsel.)

Q. I show you two instruments and ask you whether on each of them you recognize the signature of your corporation by your brother Leo. A. Yes, sir.

Q. And I ask you to look at the invoices attached to the application dated February 3, 1943, three invoices attached thereto; are they on the Fresh Grown Preserve Corporation letterhead? A. Yes, sir.

Q. Do you recognize this application signed by your brother as being one for replacement of sugar? A. This application is for replacement of sugar which is entirely different than the replacements that we had with Mr. Sealfon.

Q. I appreciate that, but is it an application for replacement of sugar? A. Yes, sir.

Q. To which there are attached invoices of your company, right? A. Yes, sir.

Q. Purporting to show that your company was selling to the American-African Export Company, Inc., 55 West

Forty-Second Street, 420 cans of imitation jams; is that correct, allegedly to go for export? A. Yes, sir.

Q. When you say export do you mean that you can get replacement certificates because the sugar product is exported? A. That's right.

Q. The same rule applies for export as it does to exempt agencies? A. Yes.

Q. Now I ask you whether your concern ever shipped to the American-African Export Company, Inc. on December 30, 1942, the amount of merchandise mentioned in this invoice; did it? A. I wouldn't know.

Q. You wouldn't know that? A. No, sir.

Q. Were you in court here during the last trial when an officer of that company testified on behalf of the Government?

The Court: Now, don't ask him to qualify the truth or falsity of a statement made by somebody else.

Mr. Barshay: I wasn't going to do that.

The Court: I am just warning you. I feel I should warn you, Mr. Barshay, because this man testified and his testimony at the last trial was very limited and unless you are going to refute something that he said at that trial I don't see the purpose of asking questions of anybody else unless you want to get that testimony in at this trial.

—158—

Mr. Barshay: I will do that but I have to lay a foundation.

The Court: No, you don't have to lay a foundation by this man. You asked this man if his company shipped this. He says he wouldn't know.

Q. Did your company ship any of the merchandise, if you know, mentioned in these invoices, to the parties mentioned therein? A. Yes, sir.

Q. You say your company did? A. Yes, sir.

Q. You know that of your own knowledge, sir? A. No.

Q. Do you wish to qualify your answer? A. No.

Q. Is your answer still yes? A. Yes.

Q. Now I show you the next application dated February

3, 1943, and ask you if that was signed by your brother. A. Yes, sir.

Mr. Hull: May we have those marked for identification?

Mr. Barshay: I will in one second, Mr. Hull. I just want to finish it.

Q. Attached thereto on stationery of the Fresh Grown Preserve Corporation are invoices, is that correct? A. Yes.

Q. Purporting the sale of merchandise to Pan-Continental Export Company, 25 Broadway? A. Yes, sir.

Q. For export. I ask you to look at that, dated Febru-

ary 1, 1943, and ask you if you know of your own knowledge whether your company sold the merchandise mentioned herein to that company. A. Whether my company sold the merchandise?

Q. Yes. A. I know of my own knowledge that the company did sell that merchandise.

Mr. Barshay: I offer them now both for identification.

The Court: Mark it for identification.

(Marked Exhibit D-5 for identification.)

Q. I show you an application dated February 9, 1943, on Form 315 and ask you if you recognize your brother's signature on this over the corporate name. A. Dated February 9, you said?

Q. Yes. A. Yes.

Q. Is that your brother's signature? A. Yes, sir.

Q. Now, look at the invoices therein purporting the sale of merchandise to the company mentioned therein. Did you see them? A. Yes.

Q. Did your company sell this merchandise attached to those invoices? A. May I look at it again?

Q. Surely (handed to the witness). A. Some of these I know of my own knowledge were sold and some I don't know about.

Mr. Barshay: I will offer them for identification.

—160—

The Court: Mark them for identification.

(Marked Exhibit D-6 for identification.)

The Court: Mr. Hull, Mr. Barshay.

(Counsel conferred with the Court at side bar.)

(Proceedings resumed in hearing of the jury.)

Mr. Barshay: Now have you got the Royal letter?

Mr. Hull: Royal Crown—I don't think we brought them down. We have them upstairs.

Mr. Barshay: Would you mind getting it, please?

Mr. Hull: May I inquire as to the purpose?

The Court: Just a minute again, gentlemen.

(Further colloquy between counsel and the Court at side bar.)

(Proceedings resumed in hearing of the jury.)

Mr. Hull: Do you want the letter?

Mr. Barshay: Yes.

Mr. Hull: We will get the letter.

By Mr. Barshay:

Q. Now, Mr. Greenberg, do you know the first date and the amount of money which you say you brought over to Mr. Sealfon, and the place? A. I don't remember.

Q. Do you know the second date, the amount of money and the place? A. No, sir.

Q. Do you know the third place and the amount of money and the date? A. Well, if you ask me with reference to

—161—

any specific times I don't remember the place, but if you ask me over a period of time I can tell you some of the places but I cannot place the particular place that I met him with any particular date.

Q. Well, I am trying to find out, sir, from your memory and recollection exactly each time and each place and each amount you claim you gave to Mr. Sealfon. A. I couldn't tell you that.

Q. You couldn't do that for any specific date or time or amount, could you? A. No, sir.

Q. Did you always carry the money in your pocket? A. Of course.

Q. Unguarded? A. That's right.

Q. Large sums of money? A. Large is a very comparative term.

Q. Half a million dollars is a large sum of money even divided over a period of time.

Mr. Hull: Well, of course, Mr. Barshay knows that there is no testimony that it was handed at one time.

The Court: No, he said in the testimony it was handed over in sums up to ten thousand dollars.

Q. You don't mean in ten thousand dollar bills, do you? A. No.

Q. So that we have it now from beginning to end you cannot give us a specific date, time or place or amount that

—162—

you gave to Sealfon? A. That is correct.

Mr. Barshay: Will you bear with me a minute? I can save a lot of time.

Q. On the 15th of August, 1944, in New York, Third Collector's District, did you file an income tax for your corporation showing that your company had an income of $57,370.97? A. May I see that?

Q. Well, that's my own, a copy of the paper, but if you want to see it— A. That sounds—

Q. Correct? A. That sounds a familiar place, date and amount.

Q. That is your best recollection? A. Yes.

Q. And for the year of 1942-43, it was several thousand dollars less, wasn't it? A. That's right, filed at a different place.

Q. Yes, but it was several thousand dollars less? A. That's right. That sounds correct.

Q. Now, Citron said to you, did he not, on each occasion or on several occasions that he would like to get more syrup on behalf of his boss? A. There were some occasions where Mr. Citron was delivering a message to me from Mr. Sealfon.

Q. He told you, did he not, that he could sell as much as you could give him? A. That is not so.

Q. Did you ask Citron where the merchandise was going? A. My best recollection is I did not.

—163—

Q. Did you know it was going to the National Biscuit to the extent of ninety-eight per cent? A. I did not.

Q. Did you ever learn that, sir, during this matter? A. I did.

Q. Now, as a sugar manufacturer you had received either directly or through your representative the ration orders as they were sent out? A. No.

Q. Did you familiarize yourself with some of the OPA regulations and orders? A. Yes.

Q. Did you know that General Order 11 was in existence? A. When? I know now that it is in existence.

Q. Well, did you know then that it came into existence? A. You mean when it did come into existence?

Q. Yes. A. Is that the year that relates to July 1, 1943?

Q. 1943, yes. A. I did not.

Q. Did you know at any time surrounding July 1, 1943, that the ration board to whom you applied for replacement certificates was no longer authorized to issue those certificates? A. I did not.

Q. When for the first time did you learn that fact? A. For the first time I learned that fact in May of 1944.

Q. Now, wasn't it you who asked Doctors to tell Sealfon about the letter? A. Yes.

Q. You were the very first one who made comment about

—164—

the letter to Doctors, weren't you? A. Not about the letter as it exists presently—I made comments to Doctors about a letter.

Q. In other words in the entire matter, whether this letter or a letter similar thereto, you were the first one who broached the subject? A. That is correct.

Q. And that was to Doctors? A. That is correct.

Q. But you contend in your testimony that the letter as presented originally was not satisfactory to you? A. I didn't say that.

Q. Then I will withdraw it. I thought you did. A. No, I didn't.

Q. Now, yours is a rather large plant? A. Yes, sir.

Q. There was lots of activity at your plant for sometime in January and February of 1943? A. Pretty fair amount.

Q. Large trucking concerns having tanks came over to your place, loaded with stuff and went out? A. Delivering stuff for us, yes.

Q. The McCormack Transportation Company was one of them used by the defendant? A. Yes.

Q. The Royal Crown used tanks, too, did it, or trucks —do you know which? A. Royal Crown's operations did not involve tank wagons, which is the McCormack method of operation.

Q. Well, what did they involve? A. Barrels.

—165—

Q. Just barrels, a large number of barrels on large trucks? A. That is correct.

Q. But the Royal Crown you did business with during 1942, did you not? A. Yes.

Q. Now, there came a time when you had a talk with Mr. Franklin of the Royal Crown, did you? A. Yes, sir.

Mr. Barshay: May I have the letter—if we haven't that letter we will skip over to the Baron Corporation.

Q. You dealt with the Baron Corporation through Lewis Martin and Company, did you not? A. Yes, sir, through Lewis Martin and Company.

Q. Yes, that is a brokerage house? A. That's right.

Q. Did you ask Mr. Lowenthal of that concern for a letter that they should set forth exempt agencies in the letter so that you could get replacement certificates? A. That conversation was had with Mr. Baron.

Q. Mr. Baron personally? A. Yes.

—166—

Q. And then he wrote a letter to you, did he? A. Mr. Baron wrote the letter to the—my recollection is that Mr. Baron wrote the letter to the Martin Company, who in turn sent us the letter. That's my recollection.

Q. You didn't feel satisfied with that letter, did you? A. No, that isn't so.

Q. You returned it? A. We returned the first letter for a different reason.

Q. It didn't mention exempt agencies by name, did it? A. My recollection is that the reason the first letter was returned is because the letter was not in the form that would be acceptable to the ration board.

Q. So you suggested what form would be acceptable to the ration board and obtained a new letter, did you not? A. That's correct.

Q. Of course you knew that letter was a false letter. A. Yes.

Q. And this is it, is it not (showing a letter to the witness)? A. I will say this about this letter: The only reason that I know it is a false letter is that the Baron Company pleaded guilty. Otherwise I wouldn't know whether it was a false letter or not.

Q. Well, you made an arrangement with the Baron Corporation to have them send a letter to you saying that they sold to exempt agencies. A. I had an arrangement with

the Baron Company whereby they would get more syrup if they sent me a letter setting forth whatever exempt agencies they were doing business with.

Q. You mean you asked them to tell the truth? Is that what you are saying? A. Well, I asked them to put it in a letter. Specifically I wasn't interested whether it was the truth or not.

Q. Well, if it was the truth, sir, they did not need you to obtain replacement certificates, did they? A. They did.

Q. When a person sells to an exempt agency, sir, directly, or indirectly, and obtains proof thereof, he could go to

any ration board and get replacement certificates, couldn't he? A. He wouldn't be entitled to it.

Q. He wouldn't be entitled to it? A. No. Only the manufacturer of the material.

Q. The Baron Corporation, like Sealfon, was a manufacturer, wasn't it? A. They would be entitled to replacements of material that was shipped out of their own quotas but not out of mine.

Q. But if they sold any merchandise to exempt agencies and they gave proof thereof—you heard Mr. Quick, did you not, on the stand? A. Yes, sir.

Q. —they would be entitled to get replacements provided they really sold to exempt agencies, isn't that so? A. That's not my impression of what Mr. Quick said.

—168—

Q. Do you mean that's your own interpretation? A. No.

Q. Did you read the law? A. Not all of it; some parts of the OPA regulations I have read.

Q. And did you hear Mr. Hull tell to this jury that if exempt agencies—

The Court: Well, we are not going to have him pass on the legal effect of OPA regulations.

Mr. Barshay: All right.

Q. At any rate—

Mr. Hull: I think he should have read the law sooner.

Mr. Barshay: He should.

Q. At any rate, Mr. Greenberg, you followed the procedure with respect to the Baron Corporation with the ration board, did you not, as you did with Sealfon? A. I think that's correct.

Q. In other words, you filed applications, through you or your brother—right? A. Yes.

Q. You attached false invoices thereto, right? A. Yes, sir.

Q. Purporting it to go to agencies mentioned in the Baron letter, is that true? A. That's true.

Q. You obtained replacement certificates. A. That's true.

Q. And then you got the sugar. A. That's correct.

—169—

Mr. Barshay: Will you mark this for identification, your Honor, the letter dated March 29, 1943?

(Marked Exhibit D-7 for identification.)

Q. Now, the Baron Corporation was a competitor of Sealfon, wasn't it, to your knowledge? A. Not to my knowledge. I wouldn't know.

Q. Well, they were in the same business. A. That's right, they were in the same business; whether—

Q. Now, you never showed this letter, did you, to Mr. Sealfon? A. No, sir.

Q. You never told him you were going to get it, did you?

Mr. Hull: Going to get what? The letter?

Mr. Barshay: Yes.

A. I don't remember.

Q. Do you remember at any time at any place having a talk with Sealfon about the S. J. Baron Corporation letter? A. Before we got the letter from Mr. Baron?

The Court: At any time.

Q. I said at any time. A. Yes. I don't remember the exact place or time, but I remember that we had a conversation about it.

Q. Well, now, you give us the conversation, please; give us the month, if you can, if you can't give us the date. A. I can't give you the month. The conversation had reference to the fact that Mr. Sealfon was getting two cents a

—170—

pound on sugars that he wasn't purchasing. I told him by what method I had procured the sugars. In order to, he was being—I was telling him why he was getting moneys which in reality he didn't expect; I mean not in reality, but which was over and above the amount of sugar that he himself was purchasing.

Q. Now have you finished, sir? A. Yes.

Q. Now will you answer my question? A. Yes.

Q. I asked you whether or not at any time or at any place you spoke to Mr. Sealfon about the S. J. Baron Corporation letter, specifically. A. My answer is yes—

The Court: He has just said he did, in order to explain why Sealfon was getting more than the amount which the two cent rebate on the sugar ordered by him alone would have justified.

Mr. Barshay: Your Honor, I asked him about the Baron letter. He didn't say one word about the Baron letter or the—

The Court: Read the reply, please, of the witness, in response to Mr. Barshay's first question.

A. (Repeated by the Reporter.)

Q. Now, I ask you, sir, did you speak to him specifically about the Baron Corporation letter? A. Yes, sir.

Q. Where and when did you speak to him? A. I don't remember.

Q. What was the conversation about the letter? A. I

thought I just said that. The conversation about the letter was that I had secured two other letters in addition to the one he wrote me and the three letters were the means by which I was procuring the sugar and he was getting two cents a pound on all of it.

Q. In other words that was a voluntary act on your part, to tell him that in addition to the letter which he had written, you went to the Royal Crown Bottling Company in Baltimore and to the S. J. Baron Corporation and you got letters from them.

Mr. Hull: I object to it. He didn't say that he went to either one of them.

The Court: He said he got letters.

Mr. Hull: Yes.

Mr. Barshay: He got letters.

Mr. Hull: That's entirely different.

Q. That you got letters—without going to them. All right. You volunteered that to Sealfon. A. Yes, sir.

Q. And then you volunteered to give him two cents a pound on each pound that he bought and which you sold to them. A. That wasn't voluntary. That was as the result of an arrangement.

Q. But when the arrangement was made, sir, you had no contemplation of getting any letters from the Baron Corporation or the Royal Crown. A. At that particular mo-

—172—

ment of the arrangement I had not.

Q. All right.

The Court: Well, what general arrangement was made which affected any other sugar which you would get above the quota?

The Witness: The arrangement was that I was to give him two cents a pound for all the sugars that I was to secure from the board by the method which was inaugurated with his letter.

Q. Now, did you ask Sealfon whether he had made any applications to any ration board? A. My recollection is yes.

Q. What did he tell you? A. He told me that he had made an application to a local board, but it had been turned down because it was not a ration exempt agency.

Q. That's right. Now did he ask you, Mr. Greenberg, "How do you know that this letter will be acceptable to the ration board in Rutherford?" Did he ask you that? A. Yes.

Q. And what did you say? A. I said I didn't know until we would submit it.

Q. So that you were willing to defraud the ration board, were you not? A. I pleaded guilty to that, Mr. Barshay.

Q. Well, that's subsequently. What I am asking you now is before. You were willing to defraud the ration board, were you?

—173—

Mr. Hull: I submit that—

The Court: He has answered. He said he pleaded guilty, and that implies an intent to defraud; and if he intended to he certainly was willing.

Q. Well, you first pleaded not guilty, didn't you? A. Well, that's—

Q. Yes, but you did? A. Yes, I did.

Q. So I am trying to find out the intent, not backward, but as of the time you did the act. You intended to defraud the ration board, didn't you? A. I think it was the general intention of all parties.

Q. I am confining myself now to you.

The Court: Well, you did intend to, didn't you?

The Witness: Yes.

A. Yes, the answer is yes.

Q. All right. And to carry out the scheme did you intend to falsify your books? A. I wouldn't know that.

The Court: Did you falsify your books, you personally falsify your books?

The Witness: No, sir.

The Court: Did you direct anybody to falsify your books?

The Witness: No, sir.

Q. In the general scheme and the discussion with your brother did you deem it necessary to falsify your books?

Mr. Hull: That a conclusion. I object to it.

—174—

The Court: I sustain the objection.

Mr. Barshay: I respectfully except.

The Court: You may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Q. Now, did you have a talk with Mr. Franklin about getting a letter? A. Yes, sir.

Q. And he gave you a letter, did he not? A. Yes, sir.

Q. Is this it (showing to the witness)? A. Yes, sir.

Mr. Barshay: I offer it for identification.

The Court: It may be marked for identification.

(Marked Exhibit D-8 for identification.)

Q. And do you recall whether that letter mentioned exempt agencies?

The Court: Well, show him the letter. Don't waste time.

A. It did mention some.

Q. (The letter was handed to the witness.) A. The letter has enumerated certain exempt agencies.

Q. Was one of them also the Navy Yard? A. Yes, sir.

The Court: Where?

The Witness: It just says Navy Yard, but the letter coming from Washington or Baltimore.

The Court: The letter coming from Washington or Baltimore?

—175—

The Witness: Either of the Navy Yards there.

Q. Then you followed out the same procedure with respect to Royal Crown, did you not? A. Yes, sir.

Q. You or your brother or between you, you both filed applications, false applications, and obtained replacement certificates by filing with the applications false invoices? A. Yes, sir.

Q. Now, do you recall when Citron on several occasions presented to you receipts to be signed by you? Withdrawn. Do you recall when you were signing receipts for Citron, originally? A. When I was signing receipts?

Q. Yes. A. We never signed receipts for Citron.

Q. But when certified checks were paid, you did, didn't you? Originally? A. I don't see the necessity for having signed any—

The Court: Do you remember whether you signed any or not?

The Witness: I didn't sign any—I may have; I don't remember having signed any receipt.

Q. Well, do you ever recall you asking Citron to sign receipts for you, originally? A. I may have.

Q. And did you ever ask Citron to sign in duplicate

—176—

without a carbon copy, without a carbon attached between the original and the duplicate? A. Mr. Citron was never

asked to sign a receipt for which he had not received a delivery. The explanation for that is, that there were days when Mr. Citron picked up his merchandise and did not sign a receipt; so the following day he would sign two receipts. It had nothing to do with any duplications.

Q. But there came a time when Citron didn't sign anything, did he? A. That's right.

Q. Now, did you ask him to sign more than one receipt without a carbon paper between them? A. Mr. Citron was never asked to sign a receipt for more merchandise than he received. If he was asked to sign a receipt, he had received the merchandise. If he was asked to sign two receipts, he had received two sets of merchandise.

Q. Did Mr. Citron tell you that he won't sign any more unless there was a carbon copy between them? Did he tell you that? Yes or no. A. I don't remember that.

Q. Did he tell you that if you insist on signing, on him signing, a receipt without a carbon, he would write the word "duplicate" or "triplicate" on the second and third copies? A. I have no recollection of that.

Q. Did you telephone when the investigation by the OPA commenced, did you telephone Mr. Sealfon and say to him in words or substance, "Sealfon, if the OPA asks you how

much gallonage I sold you, will you say four or five million?" Did you ever have such conversation with Sealfon? A. No, sir.

The Court: Ladies and gentlemen of the jury, I shall try to give you a little relief every once in a while, every hour or so, so we will recess now for five minutes.

(At this point a short recess was taken.)

Q. Mr. Greenberg, did you tell Mr. Franklin that you were going to file false invoices with the ration board? A. I don't remember.

Q. Do you remember the talk you had with him? A. Yes.

Q. Can you give it to us, to the best of your recollection?

The Court: Well, what is the purpose of this line of examination?

Mr. Barshay: To affect his credibility, sir, on the origin of the letter.

The Court: Are you going to be able to prove anything different from what he says?

Mr. Barshay: I had hoped to, your Honor. I can't guarantee it. I say I hope to.

The Court: Well, the only thing is I don't want to go too far afield in this matter, as I have said before. The question of testing a man's credibility is

very largely within the discretion of the Court, and I don't want to spend a day attacking his credibility on possibilities. If you have a situation where you feel that a direct conflict can be produced you may proceed; but don't just be feeling around all over the lot. Go ahead.

Mr. Barshay: Well, we can save time by stepping up to the bar for a second.

The Court: All right.

Mr. Barshay: (At side bar.) This man volunteered that Baron pleaded guilty. Now I want to lay the foundation for my next question; after this,

that your Honor dismissed Franklin. I didn't ask for that. He volunteered it himself.

The Court: No, because if you do I will tell why, and in great length, and you won't like it; and it will be strictly within my rights. You see, what you are trying to do is re-try the other case at the same time you are trying this case, and I don't intend to go through with that whole business again. If you want to state that I directed a verdict, I will tell why.

Mr. Barshay: Well, I was very sorry that he volunteered that.

The Court: No, you see what you are trying to do is have him assume my functions, and I won't permit that at all.

—179—

Mr. Barshay: No, it was an unnecessary dig on his part.

The Court: But that won't prove he is a liar; because I didn't find, as a matter of fact, anything about whether the letter was received.

Mr. Barshay: Well, I won't go contrary to your Honor's ruling.

The Court: No, I think it would be dangerous for you, because it will put me in a position where I shall state why.

Mr. Barshay: All right.

The Court: I mean on the question of testing his credibility, I don't see that it is effective; I don't see that it is proper.

Mr. Barshay: Well, I am trying to lay a foundation, your Honor, to bring in these issues—

The Court: I know what you are trying to do.

Mr. Barshay: —within the last issues, so that they can be deemed the same.

The Court: Yes, but I have ruled on that and I have ruled that the jury did not, as a matter of fact, determine the issues of fact which you allege they did. We have been over that thing time and time again. I have given you an exception to the ruling. I have told you that you may not refer to these facts

—180—

as having been determined, in your summation to the jury, and I have given you an exception to that. Now, we don't have to battle that every three minutes.

Mr. Barshay: That really wasn't my intent, but I thought—

The Court: I know what your intent was.

Mr. Barshay: —if I could get it to match, you see, Judge,—

The Court: I know what you are trying to do, but I say I don't intend to go over that whole other case; and so far as the finding of the jury is concerned as being res judicata, I have ruled on that specifically and categorically, and if I am wrong you have a complete record.

(Counsel withdrew from the bench.)

—181—

(Proceedings resumed in hearing of the jury.)

Mr. Barshay: I will adopt your Honor's suggestion and I will withdraw the question.

Redirect Examination by Mr. Hull:

Q. I call your attention again, Mr. Greenberg, to Exhibit D-5 and D-6 for identification which I believe contain invoices and applications submitted to the board before March, 1943, and I ask you whether any letter was ever received by the Fresh Grown Preserve Company prior to or in connection with these applications. A. No, sir.

Q. Was there any application or invoice submitted to the Rutherford Ration Board by the Fresh Grown Preserve Company before March 11, 1943, containing a name furnished to the Fresh Grown Preserve Company on any letter? A. No, sir.

Q. I show you again Exhibit D-3 for identification, D-2 for identification and D-4 for identification and ask you now whether there are eight checks contained therein for the two months period between January 15 and March 10, 1943. A. I will have to count them.

Q. Count them. A. There are eight checks.

Q. I ask you to examine the same exhibits now and tell us whether there are not eighteen checks for the two months period between March 12, 1943, and May 15, 1943. A. There are eighteen.

Mr. Hull: I will offer these three exhibits as Government exhibits in this case.

Mr. Barshay: No objection.

The Court: All right. They may be received and marked in evidence.

The Clerk: As one exhibit, Mr. Hull?

Mr. Hull: I don't care whether it is one or more. You may make it one exhibit.

The Court: No, mark them as three separate exhibits so that they may be kept distinct as they were when they were marked for identification.

The Clerk: Do you know which is which here?

Mr. Hull: I believe they are separate. Will you help me, Mr. Barshay?

Mr. Barshay: I think this would be about right.

The Clerk: The exhibit that was marked D-2 is now marked G-5.

(Received and marked Exhibit G-5.)

The Clerk: The exhibit that was marked D-4 is now marked G-6.

(Received and marked Exhibit G-6.)

Mr. Hull: And this was D-3.

The Clerk: D-3 is now marked G-7.

(Received and marked Exhibit G-7.)

Q. Mr. Greenberg, when you testified at the last trial

you took the stand in response to a subpoena issued upon the corporation, did you not? A. Yes, sir.

Q. Fresh Grown Preserve Company? A. That is correct.

Q. That called for the production of three letters, did it not? A. Yes, sir.

The Court: Well, now, don't let's go into that whole situation all over again. If you have anything specific you want to ask him go ahead and ask him.

Q. The only thing you were asked was to identify these letters, wasn't it?

Mr. Barshay: I object to that.

The Court: I don't care about that. I sustain the objection. We have been all over that. The jury was informed what he testified to at the last time, what he was called for and that he was not cross examined at length by either Government or defense counsel.

Q. You said yesterday on cross examination, Mr. Greenberg, that you cashed certain checks at a check cashing agency and turned the money in for corporate uses. Will you state—

The Court: He has testified about that, that some of the money went back into the corporation, the balance was given to Sealfon.

The Witness: That's right.

The Court: Now we don't have to go all over that again.

—184—

Mr. Hull: I didn't understand that it pertained to these checks but I am satisfied.

Q. Do you know the date of the last sale that you made to Sealfon? A. I don't know offhand.

Q. Do you know approximately the date of it? A. No. Approximately June of 1944 or May, somewhere May or June.

Q. You gave two written statements concerning these transactions in the office of the United States Attorney, didn't you? A. Yes, sir.

Q. On one of those occasions you were questioned by Assistant United States Attorney John Corcoran, were you not? A. Yes, sir.

Q. And on the other occasion you were questioned by Mr. O'Connor? A. That is correct.

Q. Of the OPA, is that correct? A. That's right.

Q. Will you look at this paper and identify it, if you can?

The Court: You are not going to offer it in evidence, are you?

Mr. Hull: Well, Mr. Barshay asked for them.

The Court: Well, give them to Mr. Barshay.

Mr. Barshay: I didn't ask they be offered in evidence.

The Court: No, he didn't ask that.

Mr. Barshay: Of course not. I asked that they

be submitted to the Court. That is what I asked, not to the jury.

Mr. Hull: I don't know what the purpose of that would be.

The Court: Well, he expressed his purpose, so that if the Court could find any glaring discrepancy in the statements made on the stand and the admissions made before these two gentlemen, that that fact could be brought out. That was your purpose?

Mr. Barshay: That was the purpose I asked for it, for the Court.

The Court: That was your purpose?

Mr. Barshay: Yes.

Mr. Hull: May I have them marked for identification?

The Court: Yes, mark them for identification.

Mr. Barshay: Would your Honor give me an exception, or objection, rather, to the comments of Mr. Hull?

The Court: Well, what particular comment?

Mr. Barshay: To whatever he said, your Honor.

The Court: He asked if he made a statement to Mr. Corcoran. Do you object to that, because you brought that out yourself.

Mr. Barshay: No, I brought it out for a specific purpose but he implied, sir, that I wanted it to be

offered in evidence and that is not so.

The Court: No, no, no. I don't know what his purpose was except to have it identified but I stopped him in order to save time, and if he had any idea of offering them in evidence they wouldn't go in. There is nothing to object to in his comment because he made none except to ask whether these were the statements made.

Mr. Barshay: Well, he said a little more than that but no matter.

The Court: Well state specifically your objection.

Mr. Barshay: He said, "Mr. Barshay asked for them" and your Honor said to him, "He didn't intend to offer them in evidence"; then he stopped.

The Court: He said, "Mr. Barshay asked for them" and I said, "Yes, Mr. Barshay asked for them for a specific purpose, not to admit them into evidence but to submit them to the Court so that the Court could determine whether or not there as any clash between the testimony given by this witness on the stand and the evidence given in those statements. That clarifies the situation.

Mr. Barshay: Will your Honor just have the dates of those statements? That is all I want, in the record, January 3, 1946 and December 11, 1945.

—187—

The Court: That bears out the statement of the witness. He said it was between the 11th and 14th of December and around the early part of January.

Mr. Hull: I should like to note that the one dated December 11 was signed on December 14 and the one dated January 3 was signed on January 7, 1946.

The Court: That is probably because of the time taken to transcribe the minutes.

Mr. Barshay: Now may I respectfully ask your Honor, because some misunderstanding may have arisen, that the jury may not speculate with respect to those statements to any degree whatever.

The Court: The statements are not in evidence and the jury has no right whatever to consider anything at all about them except the fact that they were testified about here. The contents have not been exposed to your consideration, and do not guess what might be in them.

Mr. Hull: The first one is December 11th.

The Clerk: The December 11th statement is marked Exhibit G-8.

Mr. Hull: For identification.

(Marked G-8 for identification.)

The Court: Now they will be submitted to the Court.

—188—

The Clerk: The statement dated January 3, 1946, is marked G-9 for identification.

(Marked G-9 for identification.)

Mr. Hull: They are here for any purpose the Court may wish. Do you want them now, sir?

The Court: Yes.

Mr. Hull: I will say that only part of them—I have marked those parts that relate to this case.

That is all.

The Court: All right, sir.

Mr. Hull: Oh, I do want to ask one question.

By Mr. Hull:

Q. How many pounds of sugar are contained in a gallon of syrup? A. Depends on the baume.

Q. Well the particular type of syrup that you were delivering to Sealfon? A. I would say about six and a half or seven.

Q. All right. That is all.

The Court: Now, this witness will not be available this afternoon but he will be available afterwards. I just want you to know that so that you may not be calling for him in the course of the afternoon. You will now be excused, Mr. Greenberg, and you will return here tomorrow morning.

The Witness: Thank you.

—189—

HAZEL PETRIE, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Mr. Hull: I now offer in evidence papers duly certified showing the establishment and existence of the Rutherford Rationing Board.

Mr. Barshay: No objection.

The Court: They may be received and marked in evidence.

(Received and marked Exhibit G-10 in evidence.)

Q. Mrs. Petrie, have you been connected with the Rutherford Rationing Board? A. Yes, sir.

Q. Over what period of time? A. From 1943 to 1945.

Q. What time in 1943 did you start? A. April, 1943.

Q. Beginning November, 1943, what were your particular duties there with respect to R-315 applications for replacement of sugar? A. Well, they were handled by the board as a board.

Q. Well, what was your position there, what were your duties in so far as those applications were concerned? A. As clerk to make up certificates.

Q. Did you personally handle all these applications which came in from that time? A. From November on, yes.

Q. What would you do in each instance; give us an illustration of how such an application was handled. A. Well,

—190—

the party that came in would make the application; it was acted on by the board, the board members, and passed to me to make the checks out.

Q. Are you familiar in that capacity with the account of the Fresh Grown Corporation? A. Yes, sir.

Q. Did you handle applications that they submitted? A. Yes, sir.

Q. R-315 applications after November 1st? A. That's right.

Q. I show you an application dated October 19, 1943, and ask you whether you handled that one. A. Yes, sir.

Q. Are the records contained in this file as you have it now the complete records of the board concerning these applications? A. Yes, sir, those are complete records.

Q. Were all of the invoices that are attached hereto attached to the application when it came in? A. Yes, sir.

Q. In particular was this application or rather invoice dated October 1, 1943, attached thereto? A. Yes, sir, it was.

Q. Do you know of your own knowledge what person came in to submit that to the board? A. May I look at the signature? It looks like L. Greenberg.

Q. Did the application when it first reached the board come into your hands or into the hands of a member of the board? A. Into the hands of a member of the board.

Q. One member or more than one? A. Well, possibly there was two there.

—191—

Q. Is there anything marked on the application to indicate which member handled this one? A. Yes, sir.

Q. Who was it? A. Mr. Baker.

Q. What is his full name? A. Elbert Baker.

Q. What are these papers on top, these two papers? A. Those were the sugar purchase certificates.

Q. Who issued those? A. I issued those.

Q. On the authority of Mr. Baker? A. On the authority of Mr. Baker.

Mr. Hull: I would like to have this marked for identification and to indicate that it relates to count one of the indictment.

The Court: Mark it for identification.

(Marked G-11 for identification.)

Q. I show you next an application dated November 3, 1943 and ask you the same questions concerning that; are

your answers the same? A. Yes, sir, only Mr. Galloway signed this one.

Q. Mr. Galloway is another board member, correct? A. Correct.

Mr. Hull: May this be marked for identification?

The Court: Mark it for identification.

Mr. Hull: And may the record indicate that it relates to count two?

—192—

(Received and marked Exhibit G-12 for identification.)

Q. Here is one dated November 26, 1943. Will you examine it and answer the same questions; are your answers the same? A. Yes, sir.

Q. You had occasion to examine these papers carefully before you came into court, did you not? A. Yes, sir.

Mr. Hull: May this be marked for identification?

The Court: Mark it.

Mr. Hull: Relating to count three.

(Marked G-13 for identification.)

Q. Here is one dated December 7, 1943. Examine it and tell us whether your answers are the same. A. Yes, sir.

The Court: Who handled it?

The Witness: Mr. E. W. Baker was the board member.

Mr. Hull: For identification it is relative to count four.

(Marked G-14 for identification.)

Q. The next one that I show you is dated January 4, 1944. Examine that and make the same answers? A. Yes, Mr. Baker.

Q. You issued the certificates on all of these that I have shown you? A. I did.

Mr. Hull: For identification, as to count five.

(Marked Exhibit G-15 for identification.)

Q. The next one I show you is dated January—this bears

—193—

the date of January 18, 1943. Is that— A. It should be 1944.

Q. Up here it says January 18, 1944. A. That's right.

Q. And you issued the certificates? A. I issued the certificates.

Q. And in each instance the papers were submitted as they appear in this file? A. That's right.

Mr. Hull: Relating to count six, for identification.

(Marked G-16 for identification.)

Q. February—is this the date,—February 16, 1944? Examine that and make the same answer, please. A. Yes, sir. Mr. Galloway signed this.

Q. Mr. Galloway.

Mr. Hull: This pertains to count seven.

(Marked G-17 for identification.)

Q. This one is dated February 29, 1944. A. That is signed by E. W. Baker.

Q. And handled by you in the same manner? A. Yes.

Q. And the certificates issued? A. Issued by me.

Q. These, by the way, are duplicate copies of the certificates? A. Of the certificates.

Q. And it was the practice of the Board, was it not, to attach duplicate copies of certificates to each application? A. To each application.

—194—

Q. And return them in the file? A. That's right.

Mr. Hull: As to count eight, for identification.

(Marked G-18 for identification.)

Q. The next one, March 22, 1944; what is your answer as to that? A. That was issued the same as the others, E. W. Baker. I issued the certificate.

Mr. Hull: For identification, as to count nine.

(Marked G-19 for identification.)

Q. Next one, dated March 27, 1944. A. Signed by Mr. Baker and issued by me.

Mr. Hull: As to count ten, for identification.

(Marked Exhibit G-20 for identification.)

Q. Now, I show you one dated April 4, 1944. What about that? A. That is signed by Mr. Baker and issued by me.

Mr. Hull: For identification as to count eleven.

(Marked Exhibit G-21 for identification.)

Q. The next one dated April 6, 1944. A. That was issued by me and signed by Mr. Baker.

Q. Do you know in these instances whether somebody from the Fresh Grown Preserve Company came to the board? A. Yes, sir.

Q. Who was it? A. Leo Greenberg.

Q. Do you know whether Leo Greenberg came in with each and every application of Fresh Grown Preserve Company for replacements? A. That I don't know. He did

while I was there.

Q. While you were handling it? A. Yes.

Mr. Hull: This, for identification, is as to count twelve.

(Marked Exhibit G-22 for identification.)

Q. Now, Mrs. Petrie, I show you fourteen other applications and I ask you whether you have had occasion to examine those. A. Yes, sir.

Q. You might look at them now. A. Yes, sir. I issued all those certificates.

Q. Are they all applications with invoices attached? A. Yes, sir.

Q. Submitted by the Fresh Grown Preserve Company? A. Yes, sir.

Q. Were they all acted upon by a board member and in each instance were certificates issued on the applications by you? A. Yes, sir.

Mr. Hull: May these be marked as one exhibit for identification?

The Clerk: The group is marked G-23 for identification.

(Marked Exhibit G-23 for identification.)

Mr. Hull: That's all.

Cross-Examination by Mr. Barshay:

Q. Mrs. Petrie, you testified at the last trial, did you?

A. Yes, sir.

Mr. Barshay: Mr. Sealfon, will you stand for a second?

(Mr. Sealfon rose.)

Q. Did you ever see this man at the ration board in your life? A. No, not that I remember.

Q. Did you ever speak to him in your life? A. No, sir.

Q. These records that Mr. Hull spoke of and other records of the ration board are confidential, are they not? A. That's right.

Q They are not available to the public? A. No, sir.

Q. And Mr. Sealfon to your knowledge never made application to see them? A. No.

Q. And he couldn't if he did? A. No, sir.

Q. Isn't that so? A. Yes, sir.

Mr. Barshay: May I have the letter of March 3d, Mr. Hull?

Mr. Hull: The Clerk has it. It is an exhibit.

(Exhibit handed to Mr. Barshay.)

Q. I show you letter of March 3, Government Exhibit 4. Did you ever see that in your life prior to the trial, of course, I mean? A. No; I wasn't with the board at that time.

Q. Was it ever submitted to you at any time at all while you were with the board? A. No, sir.

Q. What was the practice with respect to the board, as

far as you knew, concerning any letters that were addressed to the board containing any information with respect to any application? A. It was attached to the application and filed.

Q. And kept? A. Yes, sir.

Q. And kept with the board? A. That's right.

Evelyn Treat—for Government—Direct

EVELYN TREAT, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Miss Treat, were you also employed at the OPA ration board in Rutherford? A. Yes, sir.

Q. For what period of time? A. From the beginning of 1942 until October, 1943.

Q. What did you have to do while there with respect to R-315 applications for sugar replacement? A. I accepted the applications for action on by the board members.

Q. Is that over the entire period up to October, 1943? A. Yes, sir.

Q. What was your practice in handling them? A. I ac-

—198—

cepted the application and filed it until the board members acted on it; then after it was acted on by the members, I issued the certificate.

Q. Are you familiar with the account of Fresh Grown Preserve Company? A. Yes, sir.

Q. Did you handle some applications that were made by it? A. Yes, sir.

Q. I show you twenty-seven folders and ask you whether these are records of the board and whether they are applications that you handled in the manner that you have described. You may look at them. A. (The witness examined the folders.)

Q. You had occasion to examine these thoroughly prior to taking the stand, did you not? A. Yes, sir.

Q. All right; just look at them now. Do you recognize all of them? A. Yes, sir.

Q. What are they? A. They are applications and certificates that were issued at our board.

Q. All relating to the Fresh Grown Preserve Company account? A. Yes, sir.

Q. And in each instance handled by you in the manner that you have described? A. Yes, sir.

Q. And the certificates issued by you? A. Yes, sir.

Q. And these records are the original records of the board as they have been maintained in the board files, is that correct? A. Yes, sir.

—199—

Mr. Hull: May these be marked for identification as one exhibit?

The Court: Mark them for identification.

(Marked Exhibit G-24 for identification.)

Mr. Hull: That's all.

Cross-Examination by Mr. Barshay:

Q. Miss Treat, you too testified at the last trial? A. Yes, sir.

Q. And you gave substantially the same testimony? A. Yes, sir.

Q. You never saw Mr. Sealfon, the defendant, at your board, did you? A. No, sir.

Q. You never talked to him. A. No, sir.

Q. And so far as you know you never saw him write or handle or manipulate any of the records which you have marked for identification? A. That's correct.

Q. Did it ever come to your attention that General Order No. 11 was issued by Washington? A. No, sir.

Q. You never saw that? A. No, sir.

Q. You were never told by anyone that subsequent to July 1st, 1943, the ration board had no right to issue certificates for replacements? A. No, sir, I wasn't.

Mr. Barshay: May I have the first two defendant's exhibits for identification?

Mr. Hull: I took those, D-5 and D-6 (producing

exhibits.)

Q. Now I show you D-5 and D-6 for identification and ask you whether or not you recognize both of these folders and the papers contained therein. A. Yes, I do.

Q. Are they applications signed by Mr. Leo Greenberg and filed with your board? A. Yes, sir.

Q. On the respective dates, to wit, February 9, 1943, D-6 for identification, and February 3, 1943, D-5 for identification. A. Yes, sir.

Q. And are they Form 315 to which are attached invoices which are now attached to each one of those forms? A. That is correct, sir.

Q. And are there certificates of replacement issued by your board on the authority of members of your board that are attached now to these? A. Yes, sir.

Q. And these are the official records kept in the ordinary course of business by your board? A. Yes, sir.

Mr. Barshay: I offer them both in evidence.

The Court: Well, you may offer them later if there

be need, if you put in your case. Keep them marked for identification now.

Mr. Barshay: I see. All right.

Q. Could you tell me, Miss Treat, other than these two, are there any other applications prior to March 10, 1943, by the Greenbergs for replacements of sugar? A. Not that

—201—

I remember, not for replacements, sir.

Mr. Barshay: All right, that's all.

Redirect Examination by Mr. Hull:

Q. Miss Treat, look at the three applications attached here and tell us whether they are for—

The Court: Which are they?

Mr. Hull: These are the same ones, Exhibit D-6 and D-5 for identification.

Q. Tell us whether they are an application for replacement of sugar for export or for delivery to exempt agencies. A. (The witness examined the exhibits.)

Q. Well, read on each one. This one is dated February 9, 1943. What does that say? A. It says for replacement of sugar for U. S. Government order and for sugar for consumption out of the United States.

Q. All right. Here is one dated February 3, 1943. What does that say? A. Replacement for sugar products shipped out of the United States.

Q. And in the same folder there is another one dated February 3rd. What does that say? A. Replacement for sugar products shipped out of the United States and replacement for sugar products shipped to Treasury Department, Washington, D. C.

Mr. Hull: All right, that's all, Miss Treat. Thank you.

—202—

Mr. Barshay: May I ask one question, Miss Treat, please?

Recross-Examination by Mr. Barshay:

Q. You have been shown before, have you not, the letter of March 3, 1943, when you were on the stand? A. Yes, sir.

Q. You know which one I speak of, do you?

The Court: Suppose you get it.

Q. (Letter handed to the witness.) A. Yes, sir.

Q. That refers to G-4 in evidence. Was it ever presented by Greenberg at your ration board, to you? A. No, I have never seen it before, sir.

Q. What is the custom and the practice with respect to any letters received by your board? A. They are attached to the application.

Q. And during the time that you were there you never saw this letter at all? A. No, I didn't.

Mr. Barshay: Thank you.

Mr. Hull: Mr. Galloway.

ROBERT B. GALLOWAY, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Galloway, you were a member of this board in Rutherford, were you not? A. Yes, sir.

Q. As a member how did you handle R-315 applications for replacement of sugar when they came in? A. We exam-

ined the invoices submitted, the application to see if it was in order, and if found to be in order, then we approved.

Q. You had occasion, did you not, to handle some of the applications that came in from the Fresh Grown Preserve Company? A. I did.

Q. I show you now one which is marked G-12 for identification and ask you to tell us what you had to do with that one. A. When this application was presented we examined the invoices and the figuring of the percentages and then approved the application.

Q. Who brought it in? A. Leo Greenberg.

Q. Personally? A. Yes, sir.

Q. And delivered it to you personally or not? A. He delivered it to either the clerk or the board members; if the board members were present the board members would get it.

Q. Well, can you say whether he delivered it to you personally in this case, in this instance? A. In this case I wouldn't be able to tell you that.

Q. Do you know as a matter of fact of your own knowledge whether Leo Greenberg brought in all of the Fresh

Grown Preserve Company applications? A. To the best of my knowledge, yes.

Q. Do you know who signed all of them that you handled? A. Leo Greenberg.

Q. All right. Now, did you authorize the issuance of the

—204—

certificates that are attached to this application? A. I did.

Q. What did you base the authorization on? A. My knowledge of the OPA regulations.

Q. Well, with respect to the papers that are attached, what use did you make of those? A. Well, we examine the invoices to see if the sugar was sent to what were regarded as exempt agencies, the Navy Yard in Brooklyn being one, and that's what those invoices are all for.

Q. What do they indicate as to the account to which they are charged? A. They indicated that the material invoiced had been delivered to that address, to the Brooklyn Navy Yard.

Q. Well, read the name, read the full name that's on the invoice. A. Sero Syrup Company, 578 Manhattan Avenue, Brooklyn; ship to for Brooklyn Navy Yard, Brooklyn, New York.

Q. That's on each one of them, isn't it? A. That's correct, yes.

Q. And because it said Brooklyn Navy Yard there you authorized the issuance of the replacement? A. That's correct.

Mr. Hull: This is offered in evidence as to count 2. It is now G-12 for identification.

Mr. Barshay: Is this the first one you are offering in evidence?

Mr. Hull: Yes, sir.

—205—

Mr. Barshay: I object to it, your Honor, on the grounds heretofore urged.

The Court: I shall overrule your objection. You may have an exception.

Mr. Barshay: And I object to it on the further ground that it is not binding on this defendant.

The Court: I shall overrule your objection. You may have an exception.

Mr. Barshay: I respectfully except.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

(Received and marked Exhibit G-12.)

Mr. Hull: I point out to the ladies and gentlemen of the jury as to Exhibit G-12 that the invoice, the first invoice attached to this application is one dated October 12, 1943, which is set forth in Count 2 of the indictment. You may pass that along.

Q. Mr. Galloway, I show you Exhibit G-17 for identification and I ask you the same questions. A. My answers in this instance are exactly the same.

Mr. Hull: It is offered in evidence as to Count 7.

Mr. Barshay: Suppose, your Honor, I make one

objection to all the counts so that I won't have to take the time to repeat it.

—206—

The Court: Yes, this same general type of evidence you object to on the grounds already alleged and on the ground that it is not binding on your client.

Mr. Barshay: That is correct.

The Court: And I shall overrule both objections. You may have an exception, which will be noted on the record.

Mr. Barshay: That will apply to all that Mr. Hu intends to offer?

The Court: To all of these similar offers.

Mr. Barshay: That's right.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

(Received and marked Exhibit G-17.)

Mr. Hull: In Exhibit G-17 the first invoice attached is one dated December 30, 1943, and that is the one set forth in Count 7 of the indictment.

Q. Mr. Galloway, when these came in is it not true that all of the invoices attached were dated prior to the date of the application? A. Yes, sir.

Q. And in each instance did not the invoices show deliveries already made on the dates indicated on the invoices? A. That's correct.

Q. Now I show you one which was marked G-13 for identification and ask you the same questions as to that. A. My answers in this case are precisely the same as in the other two instances.

—207—

Mr. Hull: This is offered in evidence as to count 3.

The Court: The same objection will be noted, the same ruling made and exception allowed.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

(Received and marked Exhibit G-13.)

Mr. Hull: The first invoice attached to this one, ladies and gentlemen, is dated October 28, 1943, which is the invoice set out in Count 3 of the indictment.

Q. I now show you three other applications which have not been presented to anyone yet and ask you what you had to do with those, if anything. A. I accepted those in the same manner and approved them in the same manner, but in addition to that I also issued the certificates, because the clerk in this particular case or on those particular occasions, rather, was rushed with work and I was helping her out.

Q. One is an application dated August 4— A. That's the day it was approved, on August 4.

Q. The date of approval? A. Yes, sir.

Q. Well, the certificates are dated August 4th? A. That's correct.

Q. Three certificates that were issued. A. That's correct.

Q. On this one; and on another, the three certificates were issued on—what date is this? A. October the 10th—October 26th; yes, October 26th, 1944.

Q. Well, is that '44? You had better look at that. A. October '43, it is; '43, yes, sir.

—208—

Q. In October 1943. A. That's correct.

Q. And the third one is dated November 9, 1943? A. That's correct.

Q. And you issued, you authorized the issuance of these based on the application and invoices, and you personally issued the certificates? A. Issued the certificates, that is correct.

Q. They were brought in to you in the same manner? A. That is correct.

Mr. Hull: These are offered in evidence.

Mr. Barshay: The same objection.

The Court: The same objection, the same ruling.

Mr. Hull: They have not been marked yet.

The Court: Exception allowed.

(Received and marked Exhibit G-25.)

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Q. I show you seven other applications, files of the board, which come out of G— What are those numbers? G-23 for

identification and G-24 for identification, and we will put them back in the proper order, and ask you the same questions as to those. A. I make the same answers in all of those cases.

Mr. Hull: You may cross examine.

—209—

Cross Examination by Mr. Barshay:

Q. Mr. Galloway,—

The Court: Are you offering those, Mr. Hull?

Mr. Hull: Your Honor, I will wait until I call the other two board members and then offer them.

The Court: All right.

Q. Mr. Galloway, you testified at the last trial substantially to the same effect? A. I did.

Q. You never saw the defendant Sealfon before you got to court in your life? A. I never did.

Q. And he never spoke to you at the board, never wrote you any letters and never communicated with you in any way whatever? A. Not at all.

Q. He never sought to obtain any of the files of the ration board for the Fresh Grown Preserve? A. No, sir.

Q. This letter of March 3, 1943, Government's Exhibit 4, had you ever seen it before you came to court? A. No, sir.

Q. Was it ever presented to you by Mr. Greenberg or anyone else? A. No, sir.

Q. If you had received it what would you have done with it, in accordance with the custom and practice? A. It

would be attached to the files—to the application and kept in the files of the ration board.

Q. So that during all the time that you issued certificates to the Greenbergs, not on one of these occasions was this

—210—

letter of March 3, 1943, ever presented to you? A. Never.

Q. To your knowledge you never saw it in the board at all? A. No, no, sir.

Q. And the first time you saw it was when it was presented to you in the preparation of this case? A. That's correct.

Q. Now Mr. Galloway, you heard about ration Order No. 11, did you not? A. In the—

Q. The ration order which prohibited your board from issuing any replacement certificates subsequent to July 1, 1943. A. Not until after this case—

Q. —started? A. —started to be investigated, yes.

Q. While you were a member of the board you did not know that after July 1, 1943, you were not allowed to issue any replacement certificates? A. No, sir.

Mr. Hull: I think the word is "authorized."

Mr. Barshay: Well, we won't quibble about words.

The Court: No.

Q. You weren't authorized to do so. A. That is correct.

Q. But that's a fact you didn't know. A. That is correct.

Q. Now the only thing that Greenberg presented to you was the invoice which is not in evidence. A. That is so.

Q. You never checked with the Brooklyn Navy Yard

whether it was receiving the merchandise mentioned therein. A. No, sir.

—211—

Q. You never directed anyone in your board to do so, did you? A. No, sir.

Q. You never authorized anyone to check with the Sero Syrup Company or Sealfon whether or not the matter contained in the invoice was true? A. No, sir.

Q. You never asked for a receipt on any occasion before you issued or after you issued the replacement certificates? A. We did not ask for any receipt.

Q. You knew Greenberg was an officer of the Fresh Grown Preserve Corporation. A. Leo Greenberg—

Q. Yes. A. —he always signed his applications as vice president, or secretary.

Q. He was practically a local man, wasn't he? A. I never knew of him before, until he came to file his applications.

Q. That's right, with the board. And he is the only one who ever appeared at the board in connection with these applications? A. That's correct.

Q. So that neither you, or, to your knowledge, anyone under your authority did any other thing other than to accept the written application and a blank invoice, and an invoice, rather, submitted by Greenberg? A. That is correct.

The Court: And issuing the certificates.

The Witness: And issuing the certificates, yes.

Q. You never asked for or received any proof as to the truth of that invoice. A. No, sir.

—212—

Mr. Barshav: That's all.

Redirect Examination by Mr. Hull:

Q. Your board, Mr. Galloway, continued to operate as before with respect to the issuance of these certificates and with respect to the date of July 1, 1943, isn't that so? A. That's correct.

Mr. Hull: That's all.

The Court: I think we will recess now until ten minutes before two. The jury will be excused first.

NOON RECESS

—213—

ELBERT W. BAKER, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Baker, you were a member of the Rutherford Rationing Board, were you not? A. Yes, sir.

Q. Through what period? A. Well, when it started up until April, '45.

Q. All right, sir. Did you handle some applications for replacement of sugar? A. I did.

Q. What system did you follow in handling them? A. When the 315 form was presented we checked it against the invoices attached showing the shipment points for the various syrups or sugars and if they were for exempt purposes we issued the replacement.

Q. Mr. Baker, did you handle applications of that type on the Fresh Grown Preserve Company account? A. I did.

Q. Of those you handled who brought them in? A. Mr. Leo Greenberg.

Q. Came in in person, did he? A. He did.

Q. Did he fill them out in your presence or otherwise? A. He did in my presence.

Q. And signed them? A. Signed them in my presence.

Q. I show you an application which is dated October 19, 1943, and ask you whether you handled that one. A. I did.

Q. And in so doing did you examine the invoices on that

—214—

one? A. I did.

Q. For what purpose? A. To see whether they were for exempt agencies or not.

Q. And in this particular instance what exempt agency was listed? A. Navy Yard, Brooklyn, all for the Navy Yard, Brooklyn.

Q. Then you authorized the issuance of it based on the information contained in the application and the invoices? A. I did.

Mr. Hull: It is offered in evidence. This is G-11 for identification. It is offered as to count one.

The Court: There will be the same objection noted, the same ruling and exception allowed.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Barshay: And with respect to each count may I make my objection without specifically enumerating them?

The Court: Yes.

Mr. Hull: I show you, ladies and gentlemen, attached to this application the first invoice is one dated October 1, 1943. That is the one set out in count one of the indictment.

Q. Here is one dated December 7, 1943. What is your answer as to that? A. I handled that in the same manner as

—215—

the previous one.

Q. And authorized the issuance of the certificate? A. And authorized the issuance of the certificate.

Mr. Hull: It is offered in evidence as to count four. It is now G-14 for identification.

(Marked Exhibit G-14 in evidence.)

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
Sealed. U. S. D. J.]

Mr. Hull: The first invoice attached to this application is one dated November 8, 1943.

Q. Here is one now marked G-15 for identification and dated January 14, 1944. What about that one? A. That I handled in the same manner as the others.

Q. And authorized the issuance of the certificate? A. And authorized the issuance of the certificate.

Mr. Hull: That is offered as to count five.

(Received and marked Exhibit G-15 in evidence.)

Mr. Hull: I show you, ladies and gentlemen, the first invoice attached to this one which is dated November 29, 1943.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]
Sealed.

Q. Mr. Baker, in all of these applications that you

—216—

handled were the invoices at all times dated prior to the date of the application? A. They were.

Q. And did they in all instances indicate prior completed sales, deliveries? A. They did.

Q. Here is one marked G-16 for identification, dated January 18, 1944. A. That was handled in the same manner and the certificates authorized to be issued.

Mr. Hull: This is offered as to count six.

(Received and marked Exhibit G-16 in evidence.)

Mr. Hull: The first invoice attached to this application is one dated December 8, 1943.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]
Sealed.

Q. This one is marked G-18 for identification and is dated—is this the date of issuance? A. That is the date that we authorized it to be issued.

Q. It is dated February 29, 1944. What about that one? A. That was handled in the same manner, checked and approved for the issuance of certificates.

Q. And authorized because the invoices called for deliveries or indicated deliveries previously made to an exempt agency? A. Right.

Mr. Hull: Offered as to count eight.

(Received and marked Exhibit G-18 in evidence.)

—217—

Mr. Hull: The third invoice attached to this application is one dated January 12, 1944, and is set forth in count eight of the indictment.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. This one is G-19 for identification and it is dated March 22, 1944. What about that one? A. That was handled in the same manner, checked to see that the goods were delivered to exempt agencies and authorized the issuance of a certificate.

Mr. Hull: That is offered as to count nine.

(Received and marked Exhibit G-19 in evidence.)

Mr. Hull: The third invoice attached to this application is dated January 28, 1944, and is set out in count nine.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. Here is G-20 for identification which is dated March 27, 1944. A. That was handled in the same manner, checked to see that the goods were delivered to exempt agencies and certificates authorized.

Mr. Hull: Offered as to count ten.

(Received and marked Exhibit G-20.)

—218—

Mr. Hull: The first invoice attached to this one is dated February 5, 1944. It is set out in count ten of the indictment.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Q. The next is G-21 for identification, dated April 4, 1944. A. That was also handled in a like manner, checked to see that they went to exempt agencies and the certificates authorized.

Mr. Hull: Offered as to count eleven.

(Received and marked Exhibit G-21 in evidence.)

Mr. Hull: The first invoice attached is dated February 12, 1944. It is in count eleven.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
Sealed. U. S. D. J.]

Q. G-22 for identification, dated April 6, 1944. A. That was handled in a like manner and checked to see that the goods were delivered to exempt agencies and the certificates authorized.

Mr. Hull: Offered as to count twelve.

(Received and marked Exhibit G-22 in evidence.)

Mr. Hull: The second invoice here is the one that is in count twelve. It is dated February 18, 1944:

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
Sealed. U. S. D. J.]

Q. I now hand you twenty-six other files containing applications and invoices and ask you whether you had occasion recently to examine those. A. I did.

Q. Look at them now and tell us what you can about those. A. They were all handled in like manner, checked for exempt agencies and certificates authorized to be issued.

Q. And they are all applications filed by the Fresh Grown Preserve Company, are they not? A. All of them.

Cross Examination by Mr. Barshay:

Q. Mr. Galloway, you never saw Mr. Sealfon in your life prior to coming to court? A. Baker.

Q. I beg your pardon. You never saw him, did you? A. No, sir, never saw him.

Q. He never had anything to do to your knowledge with the filling out, signing or handling of these applications that Leo Greenberg made at your board? A. Never did.

Q. He never asked to inspect your files or see the records of the Greenbergs? A. He never did.

Q. More specifically you never saw his letter of March 3, 1943, referring to Government Exhibit 4, did you? A. No, I did not.

Q. Neither did Sealfon nor Greenberg nor anyone ever

—220—

show you this letter? A. They did not.

Q. It was never the subject of discussion at any of your board meetings? A. It was not.

Q. Nor did your clerks to your knowledge ever show it to you? A. They did not.

Q. If you had received any letter like that would you have attached it to the permanent record of your files? A. We would.

Q. And so until you came to the preparation of this case for court you never saw or heard of this letter? A. That's right.

Q. You testified substantially to the same thing at the last trial? A. I did.

Q. Now, the Greenbergs were the only people who made applications for replacement of sugar at your board? A. That's right.

Q. They were from a nearby town? A. They were.

Q. There came a time when General Order 11 was issued to take effect June 1 or July 1, 1943, but you never saw that, did you? A. I never saw it.

Q. And until the preparation of this case it was never brought to your knowledge by anyone? A. That's right.

Q. Had you known of it of course you would not have issued certificates? A. We would not.

Q. You have since learned that because of that order

subsequent to July 1, 1943, you were not authorized to issue those certificates? A. We know that now.

Q. All that Greenberg ever presented to your board was this invoice which purported the sale of merchandise to the Brooklyn Navy Yard or any other exempt agency? A. That's right. He attached them to 315.

Q. He never submitted a receipt? A. No.

Q. He never submitted any evidence of delivery? A. No.

Q. And neither you nor any member of your board nor agent of your board ever called Mr. Sealfon or wrote to him or communicated to find out whether or not the merchandise allegedly set forth in the invoice as chargeable to him was ever ordered or received by him—the answer is—A. No, we did not.

Q. Now, in addition to the Brooklyn Navy Yard being mentioned in the invoices, Mr. Greenberg also attached other applications, invoices purporting to go to other exempt agencies for other people? A. He did.

Q. A lot of them? A. Lots of them.

Q. That had nothing to do with Sero Syrup? A. No.

Q. Thank you.

Redirect Examination by Mr. Hull:

Q. The system followed by the board didn't change on July 1, 1944? A. It did not.

Q. In respect to these applications, did it? A. It did not

—222—

change.

JOHN ROBERT JONES, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Jones, you were the third member of this board, were you not? A. Yes, sir.

Q. Over what period of time? A. From the beginning till they closed in November, 1945.

Q. Did you handle some of the R-315 applications? A. Yes, sir.

Q. What system did you follow? A. Well, we followed the very same system as mentioned by the other board members.

Q. Just elaborate on that. A. For example agencies were issued the sugar with application #315 plus the invoice submitted by Mr. Greenberg. Of course the sugar was shipped previously to the application and we issued replacement on that form.

Q. Who brought in the applications for the Fresh Grown Company that you handled? A. Leo Greenberg.

Q. Did you see him personally on these occasions? A. Yes, sir.

Q. Did he fill them out and sign them in your presence? A. Yes, as I recall it he always appeared at the board at night, made the applications and signed them at the same time.

—223—

Q. All right, sir. Will you explain these eight files and tell us whether you handled these eight applications. A. Yes, sir, I did.

Q. Are they all applications of the Fresh Grown Company presented to you by Leo Greenberg? A. Yes, sir.

Q. And you issued in each instance the certificates attached based on the information contained in the applications and the invoices? A. Yes, sir, all signed by me.

Q. And every single invoice showed an actual delivery, did it not, prior to the date of the application? A. Prior to the date of the application.

Q. To an exempt agency? A. To an exempt agency.

Q. That is why you authorized the issuance thereof? A. That is right.

Mr. Hull: Now I will offer the exhibits G-23 and G-24 for identification into evidence and will put them back in the proper folder.

Mr. Barshay: The same objection on both grounds heretofore stated.

The Court: Same ruling. You may have an exception to the ruling.

(Received and marked Exhibits G-23 and G-24 in evidence.)

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.

Sealed]

—224—

Cross-Examination by Mr. Barshay:

Q. Mr. Jones, you, too, testified at the last trial substantially as you testified here today? A. Yes, sir.

Q. And prior to coming into court you had never seen or had no business of any kind, nature or description with Robert Sealfon? A. Not that I know of.

Q. You never saw him at the board? A. That's right.

Q. He never applied for papers of any kind at the board or had anything to do with making any applications at all; that's right? A. That's right.

Q. Did you ever see the letter of March 3, 1943, Government Exhibit 4 in evidence? A. Not that I can remember.

Q. Well, could you be a little more specific, sir? May I refresh your recollection? Can I? A. Yes, sir.

Q. You testified the last time when the letter was shown to you that you never saw it in your life until you came to court. Do you remember that? A. That's right.

Q. And you never did? A. That's right.

Q. It was never handed to you by any member of your board or by Greenberg or anybody else in this world, is that true? A. No, sir.

Q. You mean it is true. A. Yes, sir.

(Witness nods in the affirmative.)

Q. If you had seen it it would have been attached in accordance with custom and procedure to your files? A. That

—225—

is correct.

Q. And stayed there, is that not so? A. Surely.

Q. Now, you never were attracted to or your attention was never attracted to Order #11? A. No.

Q. And until the investigation started you did not know that that order precluded your board from issuing replacement certificates to the Greenbergs or anyone else? A. That's right.

Q. And had you known it you would not have done so? A. No.

Q. The Greenbergs were your only customers, were they not? A. That's right, only industrial.

Q. Yes, I am talking about that. Now I show you D-5 for identification and D-6 for identification and ask you whether or not the applications dated February 3, 1943, February 3, 1943 again and February 9, 1943 were received by you. A. That's right, and acted on by me.

Q. And you are the man that issued certificates of replacement attached to those applications? A. That is correct.

Q. And the applications bear the signature of Leo Greenberg? A. Yes, sir.

Q. And he is the only one who presented them to you? A. At any time, yes.

Q. Sealfon had nothing to do with the representation of

—226—

those two applications, did he? A. None whatsoever.

Q. And attached to these applications are invoices reading from D-6 for identification, dated January 19, 1942, December 8, 1942, December 1, 1942, December 1, 1942, and December 3, 1942, and February 3, 1943; is that correct, sir, as I read them? A. That's right. Just previous to the applications.

Q. And they purport to be invoices of the Fresh Grown Preserve Corporation setting forth delivery of merchandise or alleged delivery of merchandise for exportation? A. That's right.

Q. Now, will you look at D-5 for identification and can you tell me whether or not the same answers would be made to the questions if I specifically asked each and every one of them? A. That's right.

Redirect Examination by Mr. Hull:

Q. So far as you were concerned the system in handling these applications didn't change as of July 1, 1943? A. That's right, Mr. Hull.

Q. You issued certificates after that the same as before upon presentation of applications showing previous deliveries to exempt agencies? A. Yes, sir.

Mr. Hull: All right.

Recross Examination by Mr. Barshay:

Q. Just one question I forgot to ask you. You conducted

—227—

no investigation of whether or not the merchandise purported to be mentioned in the invoice was actually sold to the exempt agencies mentioned therein? A. None whatsoever.

Q. And you didn't authorize anyone else to do so? A. No, sir.

Q. And in addition to the Brooklyn Navy Yard mentioned in some of the invoices there were other exempt agencies mentioned in other invoices purported to be sold to other corporations other than the defendant, isn't that so? A. That's right.

JOSEPH E. CODY, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Cody, by whom are you employed? A. National Sugar Refining Company.

Q. In what capacity? A. I was formerly manager of the contact department and since rationing have been in charge of the sugar ration record.

Q. And in that capacity are you familiar with the records of the company relating to applications for replace-

ment, that is to say, replacement certificates that come in to you for sugar? A. We didn't differentiate between replacement certificates; we accepted the certificates whether they were replacements or not. They didn't designate

whether they were replacements or otherwise.

Q. Were you familiar with the records of the company relating to all certificates that came in for sugar? A. Yes, sir.

Q. What are these papers contained in that folder? A. Those are the National Sugar Refining Company original records of the Fresh Grown Preserve Corporation sugar ration account.

Q. I show you a piece with a list of certificate numbers and ask you whether you have compared that list with your record that you have just identified. A. Yes, sir.

Mr. Barshay: May I interpose an objection?

A. (Continuing) On January 8th—

The Court: Wait a moment.

Mr. Barshay: Excuse me, sir; for the record may I interpose the same objection with respect to this witness as I have with other prior witnesses?

The Court: Yes, I shall overrule your objection. You may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

A. (Continuing) Yes, sir, on January 8, 1946, I took this list and checked each individual certificate number and found all those certificates entered on our original record

—229—

here and credited to the Fresh Grown Preserve Corporation account.

Q. Can you say whether each and every certificate number that is listed on this paper is contained in your record? A. Yes, sir.

Q. Can you state whether full delivery of the amount of sugar specified in each one of those certificates is indicated by the record that you have? A. Yes, sir. In here it is indicated that all that sugar was delivered to the Fresh Grown Preserve Corporation.

Mr. Hull: I shall offer the records of the company in evidence and the paper. What number is it?

The Clerk: G-26.

Mr. Hull: And at this time I will offer the paper as G-26-A for identification.

Mr. Barshay: As to the entire exhibit, of course, I enter my objection, sir, as heretofore made.

The Court: Same ruling.

(The records are received and marked Exhibit G-26.)

Is there any objection to the paper separately?

Mr. Barshay: No, your Honor.

The Court: Except the general objection which you have made?

Mr. Barshay: That's right. And, of course, I also object on the further ground that it is not competent as to the defendant Sealfon.

—230—

The Court: That is included in your previous objection.

Mr. Barshay: Previous objection, yes, sir.

The Court: There will be the same ruling. I will overrule your objection and you may have an exception.

Mr. Hull: Do I understand that this is in evidence?

The Court: It is in evidence, yes, except for the general objection that has heretofore been registered and an objection that it is not binding on this defendant but it is admitted to be a correct representation or summary.

Mr. Barshay: There is no doubt about it.

Mr. Hull: Of course it isn't all that is in here.

The Court: No, but it is a summary of all that is filed by Fresh Grown.

Mr. Hull: With specific reference to those applications that related to this defendant and that I expected to connect up by another witness. All right.

(Paper is received and marked Exhibit G-26-A.)

—231—

Joseph E. Cody—for Government—Cross—Redirect
Vincent Gage—for Government—Direct

Cross Examination by Mr. Barshay:

Q. Mr. Cody, you never spoke to Sealfon in your life, did you? A. I don't believe so. I have seen him, but didn't know the gentleman until this case came up.

Q. That's right. In other words, in the issuance or in the honor of those replacement certificates, Sealfon had nothing to do at all, had he? A. No, sir.

Q. You testified in the last trial, sir,— A. Yes, sir.

Q. Substantially as you did here. Thank you.

Redirect Examination by Mr. Hull:

Q. Do you know of your knowledge, personal knowledge at this moment, whether Sealfon ever submitted any replacement applications, or certificates, I mean, to your company? A. No.

Mr. Hull: You don't know. All right.
Mr. Gage.

VINCENT GAGE, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Where are you employed, Mr. Gage? A. Refined Syrups & Sugars, Inc., of Yonkers, New York.

Q. In what capacity? A. In the Sales Department.

Q. In that capacity do you have knowledge of the rec-

ords of the company relating to the sugar ration accounts? A. Yes, I do.

Q. Can you identify the records that are contained in

—232—

this folder? A. Yes, these are certified correct copies of our original records on the account of the Fresh Grown Preserve Corporation of Lyndhurst, New Jersey, ration account.

Q. Over what period of time? A. It starts in June of '43 and continues through I believe it is May of '44.

Q. I show you—is that right, May of '44? A. Yes, that's right.

Q. All right. I show you this paper with a list of certificate numbers and ask you whether you have examined that and compared it with the records you have just now identified. A. Yes, day before yesterday I checked that against our original records.

Q. What did you find? A. I found that all the certificate numbers entered here are on our original records.

Q. Do your records show that delivery of the full amount of sugar called for in each one of the certificates listed here was made by your company, to the Fresh Grown Preserve Company? A. I do.

Mr. Hull: These records are offered in evidence.

The Court: The same objection, Mr. Barshay, will be noted as having been made against the introduction of these records, and I shall overrule the objection; you may have an exception.

Mr. Barshay: Thank you.

(Received and marked Exhibit G-27.)

—233—

Mr. Hull: And may the paper, the list of certificate numbers, be marked G-27-A?

The Court: Is there any objection to that, except the objection just made?

Mr. Barshay: The same as I raised before, your Honor.

The Court: Very well.

(Received and marked G-27-A.)

Mr. Hull: Cross examine.

Mr. Barshay: No questions.

Mr. Hull: Mr. Howes.

WALTER F. HOWES, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. What is your position with the United States Government, Mr. Howes? A. Staff accountant in the Regional Office, the Second Region Office, Price Administration.

Q. Where are the offices of the Second Region located? A. 350 Fifth Avenue, New York City.

Q. How long have you occupied that position? A. About 39 or 40 months.

Q. How long have you been an accountant? A. About 25 or 30 years.

Q. Did you have occasion to examine—

Mr. Hull: May I have your indulgence for a mo-

—234—

ment, your Honor, until I get these exhibit numbers?

The Court: Yes.

Mr. Hull: I may need these exhibits: 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27.

(Produced by the Clerk.)

Q. I want to make it clear that I am referring to the records of the Rutherford Rationing Board, all of them that have been introduced here, and the records of the two refineries that have been introduced here. Now I ask you whether you have examined all of those exhibits. A. I have.

Q. Did you make a certain analysis and some charts and summaries as a result of that examination? A. I did.

Q. Will you explain what you were attempting to show in your charts and indicate the method that you followed in preparing it and then indicate your summaries and conclusions therefrom?

The Court: No, he may not testify to any conclusions he drew.

Mr. Hull: Well, summaries; I will end it with summaries, of the figures.

A. The records of the Rutherford Rationing Board were examined and analyzed by my associate and myself and a tabulation made of the contents thereof. The records of the rationing board, the Rutherford Rationing Board, as

—235—

evidenced here, included the applications, Form 315, to which were attached the invoices showing delivery of merchandise, and the certificates, sugar certificates, Form 302, which were issued by the board against those applications.

Mr. Barshay: Excuse me, Mr. Howes.

Your Honor, may I interpose an objection to the words "showing a delivery" and substitute therefor "purporting to show a delivery"?

The Court: Well, I think that what this witness is going to try to show is a tabulation of the figures set forth in each of these two documents in toto, without drawing any conclusions or making any statements as to their effect.

Mr. Barshay: That's right. All right.

The Court: And that far he may go and no further.

A. (Continuing) I have made a tabulation of the applications showing the date of application, the name of the board member who approved such application, the sugar purchase certificate numbers that were issued against each application, the name of the board issuing clerk who issued the certificates, the weight of sugar or the amount of sugar indicated on each certificate, a list of the invoices showing dates, point of delivery or alleged delivery, the number of

gallons of syrup indicated on the invoices, and indicating the sugar content of those gallons. In addition to that I

—236—

have indicated the names of the refining company who received each of the certificates and the amount of sugar indicated on each of those certificates according to the refinery. A summary of that data—

Q. Just a moment. In all of those files that you have there out of the board records, did you find that in each instance there is with each application at least one invoice relating to Sero Syrup? A. I did.

Q. Proceed. A. The tabulation is a tabulation of the applications—the summary, rather, is of the total number of applications approved and the number of purchase certificates, sugar purchase certificates which were issued by the Rutherford Board against invoices of Fresh Grown Preserve Corporation billed to Sero Syrup Company and indicating delivery to the Navy Yard, Navy Department, Brooklyn, New York, during the period March 11, 1943, to April 11, 1944.

Q. Was the Brooklyn Navy Yard the only name that appeared on any Sero Syrup invoice? A. It was the only name which appeared.

Q. And did it appear on every single one of the Sero Syrup invoices? A. It did.

Q. Go ahead. A. There were a total of 56 applications during this period against which 131 certificates were issued, and attached to the applications were a total of 596 invoices, indicating delivery to Sero Syrup Company—

Mr. Barshay: I object to the words "indicating delivery," your Honor.

The Court: Setting forth. We don't want any language that will indicate that you are concluding something. It is a summary of statements made on there.

The Witness: That's what I have attempted to say.

The Court: I mean the term "indicating" may be confusing.

Mr. Barshay: That's right.

The Witness: It is not my prerogative to make any conclusions whatsoever.

The Court: No, exactly; and therefore avoid the use of the term "indicating" because that might mean that you are drawing an inference.

The Witness: Yes, sir.

A. (Continuing) The total number of gallons of syrup—

The Court: Set forth.

A. (Continuing) —set forth on the invoices was 3,443,400 galons, with a sugar content of 21,727,855 pounds. The certificates which were issued against these applications were surrendered by the Fresh Grown Preserve Corporation. From an analysis which I have made of the records of the—

The Court: No, no. You may testify what the

records show of the sugar company. Is that what you are going to talk about now?

—238—

The Witness: Yes, sir.

The Court: Just tell what the records of the sugar company show.

A. (Continuing) The records of the sugar refineries show as follows: National Sugar Refining Company received 88 certificates for a total of 16,554,080 pounds of sugar—

The Court: These certificates were from whom?

The Witness: From the Fresh Grown Preserve Corporation; and the records indicated that, or showed—the records show that the sugar was delivered in full against these certificates to the Fresh Grown Preserve Corporation.

The Court: The records set that forth?

The Witness: They did.

Mr. Hull: Do you wish to have the witness proceed, your Honor?

The Court: Yes, if there is anything further.

A. (Continuing) The records of the Refined Sugar & Syrups Company of Yonkers show that they received from the Fresh Grown Preserve Corporation 42 of the certificates with a total value of 8,740,992 pounds of sugar, and the records show that the total amount of sugar was delivered to the Fresh Grown Preserve Corporation. I have stated that there were 131 certificates and I have accounted for 130 of them with the two refineries, National Sugar Refining Company and the Refined Syrups & Sugars, Inc.

—239—

There was one certificate for 2256 pounds of sugar which has not appeared in the records of those refineries.

Q. Now do you have one chart showing all of those things that you have told us now? A. Yes.

Q. Is this it? A. Yes, sir.

Q. Have you stated all that is contained in the summary on this chart? A. I have.

Mr. Hull: This is offered in evidence.

The Court: Do you wish to be heard, Mr. Barshay?

Mr. Barshay: I object on the same ground, your Honor, as heretofore urged. I do not contest the accuracy of the Government's charts.

The Court: All right. Then the objection heretofore made and entered against the admission of the certificates will be considered as having been made against the admission of this chart.

Mr. Barshay: Yes, and on the further ground that it is not competent with respect to the defendant Sealfon.

The Court: Very good. I shall overrule your objection. You may have an exception.

Mr. Barshay: Thank you.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

—240—

(Received and marked Exhibit G-28.)

Q. Now did you make, Mr. Howes, another chart with particular reference to the application referring to the twelve specific counts in the indictment? A. I did.

Q. Tell us about that. A. From the twelve applications which are considered in the twelve counts in this indictment I have prepared a summary showing similar information to what was shown in the previous chart—application data, date of application, the board member approving same, the sugar purchase certificate number, the name of the issuing clerk, and the weight of the certificate, and the data attached to the application—invoices by date, destination shown on the invoices, number of gallons of syrup, the sugar content, and the name of the refinery to which each of these respective certificates were surrendered. A summary of that, of this chart, is as follows:

There were three applications approved by Robert Galloway and nine applications approved by E. W. Baker, or a total of twelve, which are concerned in the twelve counts. The number of certificates issued were six certificates through Robert Galloway and eighteen through Mr. E. W. Baker, or a total of twenty-four.

The weight of the certificates approved, for which the applications were approved by Robert Galloway, was 1,583,810 pounds, and by E. W. Baker, 4,969,125 pounds, or a total of 6,552,935 pounds.

—241—

The number of invoices attached to the applications approved by Robert Galloway, forty-three, and approved by Mr. Baker, one thirty-five, or one hundred and seventy-eight invoices.

Q. Were all of those invoices attached to those twelve applications invoices that related to Sero Syrup? A. All of the one hundred and seventy-eight invoices that I have indicated here were billed by Fresh Grown Preserve Corporation to Sero Syrup and the destination Brooklyn Navy Yard, Brooklyn, New York, was shown on each invoice.

Q. Is it true that there were no other invoices attached to those twelve applications? A. There were not.

Q. Have you completed your summary of that data? A. Not quite. The total amount of sugar content which was shown according to the invoices marked Counts 1 to 12, was 454,320 pounds. The sugar content of all other invoices 6,098,615, with a total sugar content of 6,552,935 pounds.

Q. Were each of the invoices that are set out in the twelve counts of the indictment the same amount as far as sugar content is concerned? A. Yes, exactly the same amount.

Q. What was that amount? A. That was for 37,860 pounds, on each invoice.

Q. Does your analysis, your chart, show the total with respect to each particular application? A. Yes.

Q. Have you completed your summary now of that? A. Except to say that the certificates show that National Sugar Refining Company delivered 4,423,685 pounds and Refined Syrups & Sugars, Inc. delivered 2,129,250 pounds of sugar as contained in these twelve folders.

Mr. Hull: This is offered in evidence.

Mr. Barshay: Your Honor, I do not contest the accuracy of this man's summary; I object to it on the grounds heretofore urged.

The Court: There will be the same ruling. You may have an exception.

[Which exception is hereby allowed and sealed accordingly:

THOMAS F. MEANEY

Sealed. U. S. D. J.]

(Marked Exhibit G-29.)

Q. Now I show you Exhibit G-26-A and ask you whether you made that up. A. I did.

Q. From what source? A. From the same source as the information contained in the first chart.

Q. That is to say from these exhibits? A. From these exhibits, yes.

Q. That I have placed before you. A. Exactly.

Q. And is each certificate number that is listed there found within the body of these exhibits? A. It is.

Q. Is it a listing of all of the certificates contained in

those exhibits that were delivered to National Sugar Refining Company? A. Correct.

Q. What is Exhibit G-27-A? A. A listing of all of the certificates which are contained in these folders, exhibits, which were delivered to the Refined Syrups & Sugars, Inc. by Fresh Grown Preserve Company.

Q. Did you make any other charts from these particular exhibits? A. No, I did not.

Mr. Hull: I am going to recall this witness later, your Honor. That's all I have at this time.

The Court: All right. We will recess now for five minutes. The jury will be excused first.

(At this point a short recess was taken.)

—244—

Cross Examination by Mr. Barshay:

Q. Mr. Howes, just one question, sir. You gave substantially the same testimony at the last trial, sir. A. Substantially. The charges, of course, were different.

Q. But they covered the same subject matter? A. Yes.

Mr. Barshay: Thank you.

CONRAD L. WEDEL, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Wedel, what is your position with the Government? A. Special Agent of the United States Treasury Department.

Q. How long have you occupied that office? A. About three and a half years.

Q. Where are you stationed? A. 253 Broadway, New York City.

Q. In your official capacity did you have occasion to talk to Robert Sealfon? A. Yes, sir, I did.

Q. In your conversation with him did you obtain these papers that I place in front of you? A. Yes, sir.

Q. Did he tell you what they were? A. Yes, sir, he did.

Q. What did he tell you? A. These are vouchers and checks pertaining to purchases of syrup by the Sero Syrup Company from the Fresh Grown Preserve Corporation of New Jersey.

—245—

Q. Over what period of time? A. Beginning with the early part of January, 1943, up to about the end of June, 1944.

Q. Did he tell you whether those were complete records so far as his office was concerned, of such purchases? A. Yes, he did.

Q. He said that they were complete? A. Yes, sir.

Mr. Hull: They are offered in evidence.

Mr. Barshay: No objection.

The Court: All right, they may be marked in evidence.

(Received and marked Exhibit G-30.)

Mr. Hull: That is all.

Cross Examination by Mr. Barshay:

Q. You testified at the last trial, Mr. Wedel? A. Yes, sir.

Q. When for the first time did you speak to Mr. Sealfon? A. I believe it was in the early part of January or February of 1945.

Q. You identified yourself as an agent of the Government? A. Yes, sir.

Q. He made every record available to you? A. He did.

Q. Whatever you asked for you received? A. I did.

Q. And you examined his original books? A. Yes, sir.

Q. He cooperated with you in every respect? A. He did.

—246—

Q. How many books did you examine? A. I examined the cash book and I examined the original vouchers and checks of which these are photostats.

Q. And in round figures did it show, sir, that Mr. Sealfon purchased and received from the Fresh Grown Preserve Corporation, during the period of time, over a million and a quarter's worth of vanilla syrup? A. That's right.

Q. And did the records reveal after your examination that there was issued on the books, in the check books, and entered on the stubs of Mr. Sealfon, the amount of money covering the purchase of that syrup from the Fresh Grown? A. Well, that I cannot answer because I didn't make a detailed audit of the stubs of the checks. I can only tell you that the vouchers and the checks—

Q. Matched? A. Matched with the accounts payable, the amount on the books of Sero Syrup.

Q. And the stubs in the check book had the name of the Fresh Grown written on it? A. That's right and also cash book.

Q. In every instance? A. That's right, in every instance where I made the examination or the test.

Q. Did you also make an examination showing the sale

by the Sero Syrup to the National Biscuit Company of the identical merchandise? A. No, sir, I did not.

Q. At any rate, Mr. Sealfon did not refuse to show you

any document that you wished? A. That's right, he didn't refuse.

Q. How many times had you been there? A. I was in Mr. Sealfon's office once.

Q. Did you examine the income tax return of Robert Sealfon? A. No, sir, I did not.

Q. Did you ask for it, sir? A. No, sir.

Q. In other words, that was not part of your job? A. That's right.

Q. Now, some of the checks that you examined were made directly to the Fresh Grown Corporation, were they not? A. That's right.

Q. And some of them were certified? A. Yes, sir.

Q. Now, some of the checks were made to Frank Citron, were they not? A. Yes, sir.

Q. And did you see the endorsement thereon? A. Yes, sir.

Q. Was it Frank Citron? A. That's right.

Q. Did they indicate that they were cashed at the bank upon which they were drawn? A. Yes, they were.

Q. And on the stubs of the checks made out to Frank Citron there was the name Fresh Grown Preserve Corporation? A. That's right.

Q. So they matched, did they not? A. Yes, sir.

Q. By any chance, sir, have you the exact amount of

those checks? A. It will be in with the record of the photostats.

—248—

Q. Is there a total, sir? A. Yes, sir, there is.

Q. You totaled it yourself? A. Yes, sir.

Q. Will you find it, please, perhaps more quickly than I can? A. It shows here for the period May 28, 1943 to June 23, 1944, $1,214,764.23.

Q. All revealed in the books of Robert Sealfon? A. Yes, sir.

Q. Personally examined by you? A. Yes, sir.

Q. And have you, by any chance, the summary of the moneys paid up to May, 1943, from January, 1943? A. Yes, sir.

Q. Can you give me that total, sir? A. $43,867.50.

Q. Making a grand total of what? A. Making a grand total of approximately one million, two hundred and fifty thousand dollars in which is included about twenty-five thousand dollars for freight.

Q. Would you recollect this figure, sir: $1,256,231.73? A. That is about the figure.

Q. All revealed in the original books kept by Mr. Sealfon? A. That's right.

Q. And everyone of them made available to you? A. Yes, sir.

Q. Is there any book, record, check, stub, memoranda, which you saw or asked for which was not offered to you by Mr. Sealfon? A. No, sir.

Mr. Barshay: Thank you.

—249—

LOUIS SCHUSTER, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Schuster, what is your position with the Government? A. I am a Special Agent with the United States Treasury Department.

Q. How long have you occupied that position? A. Since September 10th.

Q. This year? A. Of this year, yes.

Q. What was your position prior to that? A. I was with regional accounting staff of the OPA at 350 Fifth Avenue.

Q. You are an accountant? A. That's right.

Q. Did you make an examination and analysis of Exhibit G-30, these papers before you? A. That's right.

Q. And did you make a chart based on that examination and anlysis? A. That's right.

Q. Is this the chart that you made? A. That's right.

Q. Will you please indicate what is contained in the chart and state what summaries you made? A. A summary of these photostats was made that appear here and it showed the sales that were made by the Fresh Grown Preserve Corporation, Lyndhurst, New Jersey, to the Sero Syrup Company, located at 578 Manhattan Avenue, Brooklyn.

Q. Sales of what? A. Syrup.

Q. What kind? A. Well, it seems to have been vanilla

—250—

imitation vanilla flavoring syrup.

Q. All right, go ahead. A. Now the chart here would indicate the date,—

The Court: No. The chart shows the—

The Witness: The chart showed the date of the invoice, the number of gallons that was contained on the invoice, the price per gallon, the check number that was issued in payment, the date of the check and the amount of the check, the bank against which it was drawn and the endorsement appearing on the back of the check.

Q. You have referred to invoices. As a matter of fact, they are purchase orders, are they not? A. Well, they are invoices made out by Sero Syrup Company, if you want to call them purchase orders, because they are not the original invoices issued by the Fresh Grown Preserve Corporation, but they are in the nature of memorandums made by Sero Syrup Company showing what was purchased from the Fresh Grown Preserve.

Q. All right. What is your summary? A. The summary shows that from the period beginning January 15, 1943, to and through June 23, 1944, there was shipped 1,572,859 gallons of this vanilla flavoring syrup; that the money paid for these shipments amounted to $1,232,293.23.

Q. Did you calculate the sugar content of that syrup? A. The 1,572,859 gallons were computed on the basis of a

—251—

sugar content of 6.31 pounds per gallon, and based on

that figure you would have 9,824,740 pounds of sugar content.

Mr. Hull: I shall offer this chart in evidence.

(Received and marked Exhibit G-31.)

Mr. Hull: Do you wish to cross examine?

Cross Examination by Mr. Barshay:

Q. Attached to each check made out either to the Fresh Grown or to Citron or to Sealfon there is what you call an invoice or purchase order showing exactly what the check was for? A. Yes.

Q. That was true in every instance? A. Well, I think there are some instances where there is only the check without the purchase order attached.

Q. Not many? A. There are several.

Q. You worked with Mr. Wedel? A. Yes.

Q. Incidentally, sir, did you examine the books of the Fresh Grown in connection with your anlysis? A. I didn't examine any books. I made all my analyses from these photostats that are here.

Mr. Barshay: No questions.

Frank Citron—for Government—Direct

FRANK CITRON, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. What business are you in, Mr. Citron? A. Trucking

—252—

business.

Q. How long have you been in the trucking business? A. About ten years.

Q. In 1943 and 1944 did you have a partner? A. Yes, sir.

Q. What was his name? A. Charles Kranski.

Q. Is he a partner of yours at present or not? A. No, sir.

Q. When did that association terminate? A. About September of 1944.

Q. Did you in 1943, beginning in the early part of that year, have some business dealings with Robert Sealfon? A. Yes, sir.

Q. Will you tell us what they consisted of? A. It consisted of transportation of imitation vanilla flavored syrup from Lyndhurst, New Jersey to the National Biscuit Company.

The Court: Will you speak up so that the defendant and counsel may hear you?

A. It consisted of transportation of barrels of syrup from the Fresh Grown Preserve Corporation of Lyndhurst, New Jersey to the National Biscuit Company and several other companies.

Q. Did you have a discussion with Sealfon before you started to transport syrup for him? A. Yes, sir.

Q. What was the arrangement that you made with him? A. Well, Mr. Sealfon told me in the early part of January

—253—

that we might have some trucking from Lyndhurst, New Jersey the following month.

Q. Did he tell you then that it was going to be trucking from Lyndhurst to the National Biscuit Company? A. He didn't tell me where it was going to but he said there would be trucking out of Lyndhurst, New Jersey.

Q. Yes, go ahead. A. And in February we took our first load out of Lyndhurst to the National Biscuit Company.

Q. Prior to the time you took out the first load and after the time you first discussed it with him, were you informed by Sealfon as to where the deliveries were to be made? A. I don't really remember.

Q. Did you keep records of your transactions in your business with him? A. Yes, sir.

Q. What are these books that I show you? Identify each one of them, please. A. This is my cash book and these are the daily records of syrup that I took out of Lyndhurst, New Jersey.

Q. What is this last one? A. That is also a daily record.

Q. The last two are daily records? A. It is more or less a diary of our expenses and the amount of syrup that we took out from one day to the next.

Q. Did you keep those books? A. No, the bookkeeper kept them.

—254—

Q. Under your supervision? A. Yes, sir.

Q. All right. Refer to these records, if you need to, and tell us the number of deliveries that you made throughout the period of time in question. A. Well, I don't have a list of all the deliveries I made in the entire period, but approximately I supervised and delivered with my own truck about a million and a half gallons for the Sero Syrup Company.

Q. Now, where did you take it to? A. Well, about ninety-eight per cent of it went to the National Biscuit Company of New York.

Q. Where did the other two per cent go? A. Some of it went to the Sero Syrup, some of it went to the American Tobacco Company and the Loft Candy Company, Long Island City.

Q. Were those private customers of Mr. Sealfon? A. Yes, sir.

Q. Did you ever take any of it to the Brooklyn Navy Yard? A. No, sir.

Q. Mr. Citron, refer to the records and indicate, please, the date of the first delivery. A. The first delivery was

—255—

on February 17, 1943.

Q. What is the date of the next one? A. The next one is the 27th of February, 1943.

Q. Before you began the actual deliveries did you have an agreement with Sealfon about your payments? A. Yes, sir.

Q. What was it? A. Well, we were to pick up the empty barrels at National Biscuit Company and take them to

the Fresh Grown Preserve and wash them and cooper them and then we would have them filled, Fresh Grown Preserve would fill the barrels and we would bring them back to the National Briscuit Company, and he was to pay two and a half dollars per barrel for the deliveries.

Q. You talk about some supervision of deliveries. What do you mean by that? A. Well, supervision of deliveries started in January of 1944.

Q. And what did it consist of? A. It consisted of tanks that were hired from the McCormack Trucking Company of New York and they transported the syrup to the National Biscuit Company under my supervision.

Q. What was the reason for requiring the services of the McCormack Trucking Company? A. Well, as far as the best of my recollection, Mr. Sealfon told me there was going to be a change and they were going to ship it by tank. I didn't question him about why.

Q. The entries in your cash book were made from day to

day as you went along, were they not? A. No, the entries were made in the cash book by the accountant about once every six or eight weeks.

Q. But they reflect the date of each transaction as the situation developed, do they not? A. Well, the dates aren't accurate but the amount of loads are as far as I know correct, because sometimes I would be paid in advance on the syrup that we picked up, and sometimes I would be paid a couple of days later.

Q. Can you state what the total amount was approximately that you received from, your partnership received

from Sealfon for these services? A. In the period of a year and a half we grossed approximately $40,000.

Q. What was the part that you personally had in the transportation? A. Well, during 1943 I drove one truck daily, or whenever we had loads to pick up at Fresh Grown Preserve, and I helped load the trucks with the barrels and deliver them to the National Biscuit Company myself and unload the trucks.

Q. How many trucks did your partnership use in this transportation? A. We had three of our own trucks and we hired one truck.

Q. Now during the pertinent period, while you were transporting this syrup from the Fresh Grown Preserve Company for Sealfon, did your partnership engage in any other business? A. Yes, sir.

—257—

Q. What did it amount to? A. We delivered several loads for Mr. Greenberg to Brooklyn. There were very few. And we did some trucking for the Vita Food Company of Manhattan.

Q. Was that a large or a small percentage of your business? A. Very small percentage.

Q. Your principal business was carrying out this work for Sealfon? A. Yes, sir.

Q. What arrangement existed so far as you knew and participated in it concerning the payments for the syrup when you took it away from Fresh Grown? A. Well, sir, Mr. Sealfon would give me an envelope at the beginning to give it to Mr. Greenberg and after I gave him the envelope we would get the syrup.

Q. How long did that continue? A. For several months.

Q. Is there anything in your records to show when that terminated? A. Well, sir, I had the purchase orders that you have, the duplicate purchase orders. They show the days that I started signing for the checks.

Q. You mean the ones that we just referred to? A. I don't know whether they are the ones. I think you have them.

The Court: You say signing for the checks?

The Witness: Well, Mr. Sealfon asked me whether

—258—

I would take some cash over to Mr. Greenberg to pay for the syrup, because he was busy, and I said that I would, and I signed for a check every day that was made out to me, I would sign a purchase order and take that check to the bank, cash it and give the money to Mr. Greenberg and he would give me the syrup that I delivered.

Q. And that was the practice that began after the envelope system ended? A. Yes, sir.

Q. By "envelope system" I mean the practice of Sealfon handing you an envelope to give to the Greenbergs. A. Yes, sir.

Q. Are these the papers that you were talking about when you said you might be able to tell when you started taking the cash over (showing to the witness)? A. Well, this one says June 1st. I don't know whether it was as late as that. It may have been; I don't know.

Q. Well, I won't press that. When the time came that you began the system of payment in cash, in what way

was the cash given to you by Sealfon? A. Mr. Sealfon did not give me any cash that I can remember.

Q. What did he give you? What did he give you? A. I went to the bank with Mr. Sealfon several times and one time when I was inside the bank with him I saw him get a certified check and he put it in an envelope and I gave that check to Mr.—one of the Greenbergs; I don't remember which one.

—259—

Q. That's when you were still taking envelopes? A. Envelopes, yes, sir.

The Court: Now when it changed what happened?

The Witness: Well, Mr. Sealfon, or rather, the girl at Mr. Sealfon's office would make out a check to my name that I would sign for and cash at the bank—

The Court: Whose check was it?

The Witness: Sero Syrup's check.

Q. Signed by Sealfon, was it not? A. Yes, sir.

Q. What did you do with it? A. I cashed it at the bank and give the money to Mr. Greenberg.

Q. Was the check for the amount of the syrup that was going to be purchased, or for more than that? A. I believe it was—it included our trucking; when we weren't busy, right at the beginning, it included our trucking. I would take my trucking money off and give the balance to Mr. Greenberg. And then later on we were paid weekly, when it ran into a lot more money.

Q. Your records that you have just now identified were examined to your knowledge by Mr. Howes, were they not? A. I don't know the gentleman's name.

Mr. Hull: Mr. Howes, will you stand up?

(Mr. Howes arose.)

A. Yes, sir; yes, sir.

—260—

Q. And in making his examination he conferred with you considerably, did he not? A. Yes, sir.

Q. When you received syrup over at the place of business of the Fresh Grown Preserve Company at Lyndhurst what papers were used or exchanged in the transactions, if any? A. The only papers that were exchanged was the cash, the money; when I gave him the money he gave me the syrup.

Q. There were never any invoices used? A. No, sir, not that I know of.

Q. When you left Sealfon's place of business did you have any papers with you? A. No, sir.

Q. Did you handle any papers, in particular with reference to your purchase orders in connection with these transactions? A. Well, when I signed an original purchase order for the check that I received I was given a duplicate purchase order.

Q. Where did you sign the original? A. When I received the check, in the morning.

The Court: Where? Where?

The Witness: In the Sero Syrup Company's office.

Q. And that was made out there, was it not? A. Yes, sir.

Q. What was done with the original? A. I wouldn't know.

Q. You didn't take it out of Sealfon's office? A. No, sir.

Q. You signed it and then left it there? A. Yes, sir.

—261—

Q. What did you do with the copy? A. Well, the copy I brought home. I used it for my own records and as a receipt for the check that I signed.

Q. Was there any reason for not delivering it to Greenberg? A. None particularly.

Q. You never did, though. A. No, sir.

Q. Did Sealfon tell you not to? A. No.

Q. What did Sealfon tell you, if anything, about the duplicate copy of the purchase order that you handled? A. Mr. Sealfon never mentioned the purchase order to me. That was the first time I had seen a purchase order.

Q. Did you ever ask Greenberg for invoices? A. No, sir.

Q. Did Sealfon ever tell you to? A. No, sir.

Q. What part did Kranski have in the operations of this business? A. Well, Mr. Kranski, after a while Mr. Kranski would load the trucks in Lyndhurst and he would send the truck to me in New York and I would give the driver an empty truck. In other words, we worked it like a pony express in order to get as much syrup as we could in a short period of time. We worked approximately sixteen hours a day.

Q. Did Kranski go back and forth or not? A. He loaded most of the time.

Q. Whereabouts? A. At Lyndhurst.

Q. Do you know whether he had any other assignment there in connection with this? A. Yes, sir.

—262—

Q. What was it? A. He was to watch the Baume content of the syrup.

Q. At whose direction? A. Mr. Sealfon's.

Q. Were you present when Mr. Sealfon issued that direction? A. Well, Mr. Sealfon told me and Mr. Kranski perhaps a half a dozen times that we weren't getting the right content.

Q. Yes. A. The content was low.

Q. In talking to you about that did he make any reference to the National Biscuit Company? A. Yes, sir, he did.

Q. What did he say? A. He said the National Biscuit Company was complaining about not getting the proper content of sugar in the syrup.

Q. Can you tell us when the first time was that he told you anything like that? A. I think we had trouble right from the beginning.

Q. Do you mean in February? A. March, I believe.

Q. What part of March? A. I really couldn't say.

Q. Can you say whether it was before March 11th? A. I really couldn't say.

Q. Well, the deliveries began on February 17th. A. Yes, sir.

Q. And your best recollection is that the trouble, the complaints along the lines that you have stated, started pretty

soon after the beginning. A. Right after the beginning, yes, sir.

—263—

Q. Now, did the volume of business so far as the transportation was concerned increase noticeably after March 1943? A. Yes, sir.

Q. What can you say about that? A. Well, Mr. Greenberg told me that he could give me more syrup as the days passed, and Mr. Greenberg would tell me how much syrup I could pick up the following day and in that way I knew how many trucks to send down there and how many men, including myself.

Q. About when was it that Greenberg told you he could give you more syrup? A. Well, just before we started to get busy. That was around April or May; I don't quite remember, unless I look in here.

Q. Well, look in there and see what you can tell us. A. (After examining book.) About June.

Q. It began to get heavy about June? A. Busy, yes, sir.

Q. Now, all together after you started the cash transactions in connection with these deliveries you handled over a million dollars in cash for Sealfon, didn't you? A. Yes, sir.

Q. He gave you that and you took it over to the Greenbergs? A. Well, he didn't give me—

Mr. Barshay: I object to that. There is no such testimony, that he gave it to him in cash.

The Court: No, just tell us what happened.

—264—

Mr. Hull: Well, I see that I am slightly inaccurate. I will withdraw the question.

The Court: More than slightly.

Mr. Hull: Well, he gave him the checks, your Honor.

Q. Mr. Citron, in cashing these checks that Mr. Sealfon gave you from June 1943 on, or whenever it began, you handled over a million dollars in cash, didn't you? A. Yes, sir.

Q. And took it over from Brooklyn or New York, over to Lyndhurst? A. Yes, sir.

Q. For delivery to Greenberg. A. (No answer.)

Mr. Hull: Cross-examine.

Cross-Examination by Mr. Barshay:

Q. Mr. Citron, prior to January, 1943, you did not know Mr. Sealfon? A. No, sir.

Q. You never had any business with him at all? A. No, sir.

Q. Some friend of yours recommended you as a truckman? A. The fellow that owned the garage where I kept my trucks.

Q. Every penny that you earned for the cartage and supervision of this vanilla syrup from the Fresh Grown Preserve to National Biscuit Company or any other concern to whom you delivered it was paid for to you by Sealfon by check. A. Yes, sir.

Q. Isn't that so? A. That's so.

Q. And never by cash. A. No, sir.

Q. The check was made out to you? A. Yes, sir.

Q. I show you these checks and ask you whether or not

those are the checks that you received from Mr. Sealfon for the services you rendered as I just indicated. A. These have my signature.

Q. You cashed them? A. Yes, sir.

Q. You kept the money? A. That's right.

Q. That is, your firm did. A. Yes, sir.

Mr. Barshay: May I mark them for identification, your Honor?

The Court: Yes.

(Marked Exhibit D-9 for identification.)

Q. At no time from the beginning to the end did Mr. Sealfon ever offer you cash payments for your work. A. No, sir.

Q. At no time did he even suggest such an idea, did he? A. No.

Q. All of these payments you received from Sealfon are revealed in your books? A. Yes, sir.

Q. At no time did he ask you to conceal the entries of those checks in your books, did he? A. No, sir.

Q. At no time did he suggest to you how to keep the books. A. No, sir.

Q. Or to keep wrong books, did he? A. What kind of books?

Q. Wrong books. A. Oh. No, sir.

—266—

Q. During that time you received from Mr. Sealfon for your work, for the cartage and supervision, a total of $48,824.91, in round figures. A. In round figures—

Q. Is that so? A. I figured approximately forty, but probably it ran into more.

Q. Did you pay McCormack? A. No, sir.

Q. But you kept a record of what was due McCormack. A. Yes, sir. Not what was due them, no, sir.

Q. You kept a record of what they carted. A. What they carted.

Q. They are the concern which has large tanks on automobile trucks. A. Yes, sir.

Q. Which roll up to a place and through a hose, the tank is filled, and then goes out. A. That's right.

Q. You supervised each and every one, or you and your partner supervised each and every one of those loads? A. That's right.

Q. Now to the tune of 98 percent you delivered directly the same product you got at the Fresh Grown to the National Biscuit Company in New York or Long Island or wherever it was. A. Imitation vanilla flavored syrup.

Q. You didn't stop enroute at all? A. No, sir.

Q. Now from those concerns, the National Biscuit and the other commercial concerns, like Loft and the others, you received receipts, did you not? A. I did.

—267—

Q. For every gallon of syrup you delivered. A. That's right.

Q. And then those receipts you gave over unto Mr. Sealfon. A. I did.

Q. And you left them with him. A. I did.

Q. Is that so? A. That's so.

Q. Now Mr. Sealfon never told you, either in words or in substance, or insinuation, to tell anyone or indicate to any-

one that you delivered stuff to the Brooklyn Navy Yard? A. No, sir.

Q. Mr. Sealfon did not interfere with the keeping of your records and books, did he? A. No, sir.

Q. There were times when Mr. Sealfon told you that the National Biscuit complained to him that the syrup you were delivering was a little short in sugar content, is that so? A. He did.

Q. He told you to tell the Greenbergs about it, didn't he? A. Yes, sir.

Q. And you complained to them? A. I did.

Q. And you had Mr. Kranski watch that they shouldn't do it? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. Some of the complaints went unheeded. A. That's right.

—268—

Q. And you complained again. A. I did.

Q. Baume means the amount of sugar content in the syrup, is that right? A. That's right.

Q. You had instructions to receive a certain amount of sugar content with every load, isn't that so? A. I did, that's right.

Q. As a matter of fact, you were taught how to make a Baume test. A. I was.

Q. Isn't that so? A. Yes, sir.

Q. It is a simple test by which you measure the sugar content in the syrup. A. Yes, sir. The chemists for the Sero Syrup Company showed me how to operate the Baume tester.

Q. And you had to do it on several occasions because the

Greenbergs did not give the sugar content they were supposed to. A. That's right.

Q. You had an account at the same bank with Mr. Sealfon? A. I did.

Q. What is the name of that bank? A. Manufacturers Trust Company.

Q. And the address? A. 84 Broadway, Brooklyn.

Q. And you were known there? A. Yes, sir.

Q. Mr. Sealfon didn't tell you to open an account there, did he? A. No, sir.

Q. You had your account before you met Mr. Sealfon. A. I did.

—269—

Q. At that very bank. A. Yes, sir.

Q. That was a coincidence. A. That's right.

Q. You operated in the same general neighborhood. A. That's right.

Q. Now when you first commenced to go to Lyndhurst for the purpose of getting syrup, you testified that Mr. Sealfon gave you envelopes, is that so? A. That's so.

Q. Now sometimes he gave you those envelopes at the bank. A. That's right.

Q. Sometimes at his office. A. That's right.

Q. Sometimes they were bank envelopes. A. That's right.

Q. And sometimes they were office envelopes. A. That's right.

Q. And each envelope was a very thin envelope, as you got it. A. That's right.

Q. Isn't that so? None of it was bulging. A. No, sir.

Q. And on one of the occasions you saw there was a cer-

tified check which Mr. Sealfon put in the envelope and handed to you. A. That's right.

Q. Did he ever tell you not to open the envelope or to conceal its contents from anyone? A. No, sir.

Q. You gave the envelope to Mr. Greenberg, one or the other, and you got your syrup and left. A. That's rght.

Q. Do you know whether or not that from January 15, 1943, up to March—Excuse me, sir.—up to May 15, 1943,

—270—

whether those envelopes contained certified checks to the Fresh Grown Preserve Corporation? Do you know that of your own knowledge? A. I wouldn't know.

Q. But at any rate, Greenberg never trusted one load of syrup to go out of his premises unless you paid him, either by check or by cash or an envelope.

Mr. Hull: I object to it. That's a conclusion.

The Court: I think the choice of the word "trusted" might involve a conclusion.

Mr. Barshay: That's right. I beg your pardon.

The Court: But you never did actually take away any syrup without having proffered either the cash or the envelope.

The Witness: I never did.

The Court: To Mr. Greenberg.

The Witness: Greenberg.

Q. As a matter of fact, did not the Greenbergs insist before the load was even put in your truck that you pay them? A. That's right.

Q. What? A. That's right.

Q. Now there came a time when Greenberg would tell you in advance how much syrup you could have the following day. A. That's right.

Q. You would then transmit that message to Mr. Sealfon, is that so? A. That's so.

—271—

Q. And he would give you a check which you would cash at the bank, is that so? A. That's right.

Q. And deliver to Mr. Greenberg? A. That's right.

Q. Was that method applied generally later on? A. Yes, sir.

Q. The first time when you received a check made out to your order from Sealfon, were you asked by Sealfon to sign a paper in his office? A. I was.

Q. A purchase order? A. Yes, sir.

Q. Is that so? A. That is so.

Q. That had the amount you were to get in gallonage, is that correct? A. That's right.

Q. And the amount of the check on the invoice? A. I think some of the purchase orders included my trucking fee on the purchase order.

Q. That's right, you said that. Then you would tabulate both and get a check for the full amount to your order? A. That's right.

Q. As a receipt for that check you signed on that purchase order, on the original. A. I did.

Q. You would then take the check with the duplicate of that purchase order and go to the bank, is that so? A. That's right.

Q. And at the bank you would cash that check. A. That's right.

—272—

Q. Deduct the money that was coming to your concern, is that so? A. That's right.

Q. And deliver the balance directly to the Greenbergs for each load. A. I did that.

Q. At any time did Sealfon tell you not to give the duplicate purchase order to Greenberg? A. No, sir.

Q. At any time did he tell you to conceal it or do anything with it at all? A. No, sir.

Q. At any time in these transactions did Mr. Sealfon ask you to do anything wrong with respect to records, moneys, deliveries, or transactions? A. No, sir.

Q. I show you five envelopes containing checks and original purchase orders from April 29, 1943, to June 23, 1944, and ask you whether you can identify the checks and the purchase orders therein as having been received by you, cashed by you, and your signature appears on the purchase order. A. These are my signatures. Some of these signatures have my partner's name on it.

Q. You recognize your partner's name? A. Yes, sir.

Q. All right. Go ahead. A. I went through this list at the last trial—

Q. Before, at the last trial? A. Yes, sir.

Q. Is it the same one, sir? A. Yes, sir.

Mr. Barshay: Is there any question about it, Mr. Hull?

—273—

Mr. Hull: Those are the original purchase orders, are they?

Mr. Barshay: Yes, Mr. Hull; just exactly as you had them in the last trial.

Mr. Hull: I understand they are coming out of Sealfon's records?

Mr. Barshay: Yes.

Mr. Hull: I don't question that.

Mr. Barshay: May we offer them as one exhibit, your Honor?

The Court: Mark them for identification as one exhibit.

Mr. Barshay: As one exhibit, yes; it will save a lot of trouble.

Mr. Hull: Those are all originals, I understand, not copies.

Mr. Barshay: Yes, Mr. Hull, exactly the same as you had then.

(Marked Exhibit D-10 for identification.)

Q. Now, refer to Government's Exhibit 7 in evidence, 6 in evidence and 5 in evidence; I ask you to look at these checks, some certified and made to the order of the Fresh Grown Preserve Company, and ask you whether or not to them is attached some memorandum showing receipts or signatures, rather, of one of the Greenbergs.

—274—

Mr. Hull: Well, is this something that he handled?

Mr. Barshay: Yes, those are the first few loads, Mr. Hull.

Mr. Hull: I would like to know more about them, what he had to do with them.

Mr. Barshay: All right, all right, I will do it that way.

Q. Now, you said you took out the first load when? A. February 17, 1943.

Q. And what is the amount of the gallonage, please? A. 1500 gallons.

Q. And how many barrels is that? A. 30 barrels.

Q. 30 barrels. Did you get some writing from the Greenbergs at that time? A. I got a receipt.

Q. At that time? A. Yes, sir. I signed a receipt, rather.

Q. And did you get any duplicate memorandum from them? A. Yes, sir.

Q. That was at the time when you were bringing over all the envelopes, before you started to give cash? A. That's right. This was right at the beginning.

Q. Yes; because when you started to give cash, you said nothing was exchanged. A. That's right.

Q. Other than the moneys. A. That's right.

Q. But prior thereto, when it was by certified check ei-

ther in an envelope or not, you got some memorandum or signed some memorandum.

Mr. Hull: Well, he hasn't said that. These exhibits are Government exhibits and they are all prior to March 10, 1943.

Mr. Barshay: Yes, I produced them for you, Mr. Hull.

Mr. Hull: But they are prior to March the 10th. That's what I am talking about.

Mr. Barshay: Yes, I said commencing February 17th, 1943.

Mr. Hull: And running up to June, I think you said.

The Court: Well, when do they run to?

Mr. Barshay: The last one is May 15th, your Honor.

Mr. Hull: The check.

Mr. Barshay: Yes.

Mr. Hull: Yes.

Mr. Barshay: These are all from that envelope, Mr. Hull, if you want to look at it to save time.

Mr. Hull: Are you using the Government exhibit?

Mr. Barshay: Yes.

Mr. Hull: All right.

The Court: Now do you suppose that you could keep fresh in your mind until tomorrow morning at ten o'clock the line of questioning you desire to carry on?

Mr. Barshay: I am certain, sir.

—276—

The Court: Well, do that then, and we will recess until ten o'clock tomorrow morning.

The jury will be excused first.

[Adjourned to Friday, January 11, 1946 at 10 o'clock A. M.]

—277—

Newark, N. J., Friday, January 11, 1946

(Trial resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: I think you were in the process of cross-examining, were you not, sir?

Mr. Barshay: Yes. Just a question or two from Mr. Citron.

FRANK CITRON resumed the stand.

Cross Examination by Mr. Barshay (Continued):

Q. Mr. Citron, did there come a time when you were asked by Murray Greenberg to sign a receipt in duplicate or triplicate without a carbon copy between them? A. Yes, sir.

Q. How many times did he ask you to do that? A. I don't remember. It was maybe three or four times, half a dozen times.

Q. Did you tell that to Mr. Sealfon? A. I did.

Q. Speak up a little bit louder. A. I did.

Q. What did Mr. Sealfon say to you? A. Mr. Sealfon told me not to sign any more duplicate copies unless there was a carbon copy in between.

Q. And if there was no carbon copy in between them did Sealfon tell you to do anything? A. Yes, sir.

Q. What? A. He told me to mark the second copy duplicate with indelible pencil.

Q. And that is what you continued to do? A. Yes, sir.

—278—

Q. Now, was there any time that you took out a load of syrup from Greenberg at the time that you were signing receipts that you failed to sign a receipt so that Greenberg would have to ask you the next time to do it? A. I don't remember if he did that.

Q. Now, did there come a time, Mr. Citron, when there was a shortage in the amount of money due the Greenbergs for a certain load on a particular day in the sum of $30; remember that? A. I don't really.

Q. Do you remember Greenberg demanding $30 in addition to the amount you brought him and you had to lay it out yourself before he would permit you to take the load out? A. I don't know whether it was the sum of $30 but it was a small amount of money.

Q. In other words, Mr. Greenberg said in words or substance that unless you were to give him the difference you couldn't take the syrup out? A. That's right.

Q. And then you laid it out yourself? A. Yes, sir.

Q. And then did you get it back from Mr. Sealfon in the form of a check? A. I did.

Q. Now, do you recall also a time when you handed money to Greenberg and it was a shortage of twenty-five cents; remember that? A. That was fifty cents.

Q. Fifty cents. What did Greenberg say about that? A. He asked me where the fifty cents was so I told him I had

—279—

forgotten to give him—

Q. What? A. I told him I had forgotten to give him the fifty cents.

Q. What did he ask of you? A. He asked for the fifty cents.

Mr. Barshay: That's all.

The Court: Was it due him?

The Witness: Yes, sir.

Redirect Examination by Mr. Huli:

Q. Have you discussed your testimony in this case with Mr. Barshay? A. No, sir.

Q. Have you discussed it with Mr. Sealfon? A. No, sir.

Q. Have you discussed it with Mr. Rosen? A. No, sir.

Q. Have you discussed the case at all at any time with any of them? A. Not with any of them. I have discussed it with my partner, my ex-partner, Mr. Kranski.

Q. Why didn't you turn over the purchase orders that you had the copy of to Greenberg? A. Well, Mr. Greenberg never asked me for them.

Q. Is that the only reason that you didn't do it? A. The only reason.

Q. Do you know of your own knowledge whether Greenberg knew if you had such copies of purchase orders?

Mr. Barshay: Now I object to that, sir. It would not be binding on the defendant, it would be a mental

operation.

The Court: Unless Mr. Greenberg heard him. He

says, "Do you know of your own knowledge;" he is not asked to speculate.

Mr. Barshay: He is now asking about Mr. Greenberg's mind, not about his mind, but Greenberg's mind.

The Court: Well, I mean the situation was such that this man,—if he showed it to Greenberg it would not be an operation of Greenberg's mind. I think he may state the situation as it existed without passing on the mental reactions of Greenberg or his own mental reactions which were not communicated to Greenberg. Did you ever show Greenberg any of these copies of purchase orders?

The Witness: No, sir.

The Court: Did Greenberg ask you if you had them?

The Witness: No, sir.

Q. Did Greenberg ever say anything—

The Court: Oh, stop it; never mind.

Mr. Hull: I will offer these records that Mr. Citron has identified in evidence.

(Received and Marked Exhibit G-32.)

Mr. Hull: That's all.

Charles Kranski—for Government—Direct

CHARLES KRANSKI, called and sworn on behalf of the Government, testified as follows:

—281—

Direct Examination by Mr. Hull:

Q. Mr. Kranski, you were a partner of Frank Citron, were you not, in the trucking business in 1943 and 1944? A. I was.

Q. Did you participate personally in furtherance of the business that your partnership had with Sealfon? A. I was.

Q. What did you have to do with it? A. I was loading trucks in Lyndhurst, New Jersey, shipping them to Frank Citron.

Q. Did you have any particular assignment? A. Testing the baume and washing the barrels.

Q. Who told you to do that? A. To wash the barrels?

Q. No, to test the baume. A. Mr. Sealfon.

Q. What did he say to you? A. See that it is always about 31 baume because he never got the right baume.

Q. Did he give you any reason for wanting that done? A. The National Biscuit made a complaint to them that they weren't getting the right stuff.

Q. All right. Were you there continuously while these operations were going on? A. I was always there.

Q. For what period of time? A. I would say from about March or April until we stopped getting the stuff.

Q. Your first delivery was in February, was it not? A. That's right.

Q. Would that be the time? A. No, because Frank and I drove the truck at that time.

Q. Can you be definite about when you went and stayed there, when you began to do that? A. I couldn't tell that.
Q. You say March or April? A. March or April.

Mr. Hull: Cross-examine.
Mr. Barshay: No questions.

WALTER HOWES recalled.

Mr. Barshay: Mr. Hull, may we address the Court for a second at side bar?

(The following colloquy took place at side bar.)

The Court: Counsel now asks for permission to enter an objection to the introduction of the books as he was occupied otherwise at the time they were offered.

Mr. Barshay: On the ground that they are incompetent, it having been testified to by Citron that he was told by the defendant to keep correct records and not to keep incorrect records.

Mr. Hull: He didn't say that today.

Mr. Barshay: I am not talking about today.

Mr. Hull: I mean he didn't say that in this trial.

The Court: He didn't say that in this trial.

Mr. Barshay: I asked Mr. Citron if he intended to keep wrong books. I will show you the question. He said no.

The Court: It doesn't make any difference.

—283—

Mr. Barshay: If they were incorrect there is no evidence that it was at the suggestion of Sealfon.

The Court: You are presuming that the books are incorrect.

Mr. Barshay: No.

The Court: Then how are they incompetent?

Mr. Barshay: If they should be incorrect it would not be at the suggestion of the defendant Sealfon. I don't say that they are.

The Court: This is simply to show a factual situation and they are offered to show not anything other than these shipments as I understand it.

Mr. Barshay: Then I won't have any worry, but if the other question should arise—

The Court: If it should arise then you may make your objection at the time that it arises.

(Proceedings resumed within hearing of the jury.)

Q. Mr. Howes, I now hand you Exhibit G-32, and ask you to tell us whether you made an examination of an analysis of those books. A. I did.

Q. Did you make a chart following your examination? A. I did.

Q. Please explain what is contained in the chart and then give us the summary. A. From analysis of the cash book and cash receipts and the day books showing the daily

—284—

memorandum of the truckers, Citron and Kranski, I have made the following tabulation.

For February, 1943, starting February 17, they trucked 4500 gallons, with a sugar content of 28,395 pounds of sugar.

Mr. Barshay: A little louder, please.

A. (Continuing) March they trucked 15,000 gallons with a sugar content of 94,650 pounds of sugar; April 1943, 12,000 gallons with a sugar content of 75,720 pounds; May 1943, 22,500 gallons with a sugar content of 141,975 pounds; June, 1943, 71,050 gallons with a sugar content of 448,326 pounds; July, 1943, 155,650 gallons with a sugar content of 982,152 pounds; August, 1943, 85,700 gallons with a sugar content of 540,767 pounds; September, 1943, 38,250 gallons with a sugar content of 241,358 pounds; October, 1943, 34,350 gallons with a sugar content of 216,749 pounds; November, 1943, 59,150 gallons with a sugar content of 373,327 pounds; December, 1943, 47,500 gallons with a sugar content of 299,725 pounds.

For the year 1943 that made a total of 545,650 gallons with a sugar content of 3,433,054 pounds which was trucked by Citron and Kranski.

—285—

Starting at 1944 they trucked part of the shipments themselves and supervised the shipment by other conveyors.

The figures for 1944 were:

January, 9,000 gallons trucked and 170,456 gallons supervised, with a total sugar content of 1,132,367 pounds.

February they trucked 16,000 gallons and supervised 193,625 gallons, with a total suger content of 1,322,734 pounds.

March they trucked 21,250 gallons and supervised the trucking of 221,412 gallons, with a sugar content of 1,531,198 pounds.

April they trucked 27,900 gallons and supervised 180,993 gallons, with a total sugar content of 1,318,115 pounds.

May they trucked 17,800 and supervised 125,552 gallons, with a total sugar content of 904,522 pounds.

June, from June 1st to June 23rd they trucked 26,050 gallons. They did not supervise any trucking. The sugar content was 164,376 pounds.

Making a total for the year 1944, from January 1st to June 23rd, of 6,359,775 pounds, sugar content.

The grand total for the period February 17, 1943, to June 23, 1944, was 1,555,688 gallons, with a sugar content of 9,816,396 pounds.

Q. June 23,1944, was the date of the last delivery? A.

That's correct, sir.

Mr. Hull: This is offered in evidence.

Mr. Barshay: I do not object, sir, to the accuracy thereof, merely to the competency, on the grounds heretofore urged.

The Court: All right, I shall admit it. You may have an exception.

(Received and marked Exhibit G-33.)

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Q. Now I show you Exhibit G-5, G-6, G-7, and ask you whether you analyzed those exhibits. A. I did.

Q. And made a chart? A. I did.

Q. Please tell us about that. A. A compilation of the checks, Exhibits G-5,. 6 and 7, checks of Sero Syrup Company payable to Fresh Grown Preserve Company, together with delivery slips of Fresh Grown Preserve Corporation, showed for the eight checks from January 15, 1943, to March 10, 1943, a total value of $8,617.50.

The checks from March 12; 1943, to May 15, 1943, a total of $18,900. Or a total of $27,517.50.

The amount for the approximately two months, the first two months period, or eight checks $8,617.50; and the second approximately two month period, from March 12 to

—287—

May 15, $18,900, indicated an increase of about 120 percent.

Q. In the volume of business in the second two month period as compared with the first? A. That's correct.

Mr. Hull: That's offered in evidence.

Mr. Barshay: The same objection, your Honor, only to the competency, not to the accuracy.

The Court: The same ruling.

(Received and marked Exhibit G-34.)

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.

Sealed.]

Mr. Hull: That's all.

Mr. Barshay: No questions.

Mr. Hull: Your Honor, I would like now to request permission to recall Mr. Murray Greenberg for further redirect examination.

The Court: Any objection?

Mr. Barshay: No, sir.

The Court: All right. Mr. Murray Greenberg.

MURRAY GREENBERG, resumed.

Redirect Examination by Mr. Hull (Continued):

Q. Mr. Greenberg, you testified yesterday during cross concerning the places where deliveries of the cash were made by you to Sealfon and I believe you stated that you couldn't accurately name specific times and places—

—288—

The Court: Times, places and amounts.

Q. —and amounts. Can you name any of the places or any of the times?

Mr. Barshay: Now I object to that, your Honor. That's not proper redirect.

The Court: Well, I will ask it; you may object to my question.

Mr. Barshay: I do.

The Court: I want to find it out and the jury wants to know, too.

Can you recall any particular time or any particular place or any particular amount at which and which you paid over money to Sealfon?

The Witness: Your Honor, I can remember some of the places that—

The Court: Where?

The Witness: One of the places was the Longchamps Restaurant at 41st Street and Broadway. We would have lunch there occasionally, at which time I would pass over some of the money. But I can't tell you the exact dates.

The Court: Well, can you tell us approximately the dates?

The Witness: Yes, approximately they were in the months of July, August, September.

The Court: In the summer?

—289—

The Witness: In the summer of '43. And periodically thereafter.

The Court: Any other places?

The Witness: We had lunch a number of times in a bar and grill on 14th Street east of 9th Avenue—I don't remember the number.

The Court: Do you remember the name of it?

The Witness: No, I don't remember the name. Any number of times we would just sit in my automobile or his automobile and discuss it, the idea naturally being to have as little people around us as possible.

The Court: Well, you would have a lot of people at 41st and Broadway at Longchamps Restaurant.

The Witness: Well, during the lunch hour, yes, but later in the afternoon you don't, around three o'clock or after that; between twelve and two you would, but after that it would thin out materially.

The Court: Anything further?

Mr. Hull: Yes, sir.

Q. Did you fully inform your brother, Leo Greenberg, of the substance of all of your discussions with Sealfon? A. Yes, sir.

Mr. Barshay: I object to that, sir.

The Court: Why?

Mr. Barshay: As not binding on this defendant.

—290—

The Court: Well, when were the discussions had? It would be for the jury to say whether or not they would be binding. If the jury were to determine that as a matter of fact this defendant did aid and abet then there would be an agency established and the acts of this witness done during the course of that situation would be binding on the defendant. You may have an exception to the ruling.

Mr. Barshay: Yes, your Honor.

[Which exception is hereby allowed and sealed accordingly

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Q. I show you now exhibits D-5 for identification and D-6 for identification and I ask you to look at each of those applications contained therein and each invoice attached thereto and tell us what is your best recollection as to each one of those transactions. A. Do you want me to read them?

Q. I want you to indicate the account that is referred to in each one so that you can say what the transaction was. A. This one refers to the Finance Officer, New Orleans, for 200 cases of jam and this invoice was shipped.

Q. What date? A. The invoice date is January 19th.

Q. What is the date of the application to which that—

The Court: What is this? What is this? What is this shipment?

—291—

Mr. Hull: These are applications, your Honor, that have been referred to on cross-examination, exhibited to this witness, and he was asked a few questions concerning them. Now I want to clarify the whole picture as to the—

The Court: Well, what are they? Are they for Sealfon?

Mr. Hull: No, sir, they are other accounts. They are the ones that Mr. Barshay exhibited to Mr. Greenberg.

The Court: What have they to do with?

Mr. Hull: They show in some of the invoices deliveries to Pan-American Export Company, Colonial Stores, Inc.,—I think I should have said Pan-Continental—and American-African Export Company. Those three accounts—

The Court: Are they the three that were supposed to have placed foreign shipments?

Mr. Hull: Yes, sir. In some instances they were indicated as foreign shipments, that's right.

The Court: All right.

Q. What was the date of the application? A. The date of the application is February 9th.

Q. All right. Now talk about each invoice attached to that one.

The Court: Let me see (examining exhibits). Were these for replacements?

The Witness: Yes, sir.

—292—

The Court: And you say that was shipped?

The Witness: Yes, sir.

The Court: Was it shipped to Quartermaster Supply Officer of the New Orleans General Depot?

The Witness: Yes, sir.

A. (Continuing) The next one is under date of December 8, 1942, to the Colonial Stores, 900 cases of imitation jams, and this invoice was shipped to the Colonial Stores.

The next is under date of December 1, 1942, to the Colonial Stores for 18,000 cases of imitation jams, and this invoice was shipped to the Colonial Stores.

The next is an invoice dated Decembe 1 to the Colonial Stores for 1200 cases of imitation jams and this invoice was shipped to the Colonial Stores.

The next is an invoice dated December 3rd to the Colo-

nial Stores for 600 cases of imitation jams and this invoic
was shipped to the Colonial Stores.

The next is an invoice dated February 3, 1943, to Pavi
& Company for 1800 cases of assorted preserves and thi
was an order that we received from Pavia, and as soon a
we received the order we made the merchandise up. Th
practice at that time was after you made the merchandis
up, then you waited for shipping space. It was aroun
that time, in the early part of 1943, where the shippin
space became scarce, more scarce all the time, because ther

—293—

was a tremendous sinking of boats, and it wasn't unt
somewhere later in the year, June, July or August, som
where in there, that we finally discovered that shippin
space would not be available, and this merchandise wa
merchandise that could not stand around indefinitely—pr
serves deteriorate in time, so the merchandise had to b
sold in other directions.

Q. At the time that invoice was submitted to the boar
it had not been delivered? A. That's right.

—294—

Q. All right, go ahead. A. The next page is an invoic
dated June 8, 1942 to Delft Packing Company for 40 case
of assorted jellies and preserves and this was delivery i
voice of February 1, 1943 to Pan-Continental Export Com
pany and this merchandise was not delivered for pract
cally the same reasons of the other. This was an orde
which we received from the Pan-Continental Export bein
merchandise was sold to them, merchandise was made u
then the merchandise was awaiting the securing of shi

ping space. Eventually the Pan-Continental Export Company received shipping space but the amount of shipping space that they received was very much smaller than was necessary for the amount of merchandise. At that time before we made the delivery to the boat the Pan-Continental Export Company requested a sample of the material and we submitted a sample which did not meet with their approval and the order was cancelled and the merchandise was sold in another direction, not for the Pan-Continental.

The Court: Had the merchandise been made up before the application was made for the sugar?

The Witness: The merchandise was made up. I think the merchandise was made up—I wouldn't remember.

The Court: All right.

A. (Continuing) The next is an invoice for South Seas Export and Import Company for 800 cases of assorted jams and marmalades and the same explanation holds true.

—295—

The Court: Did you get the orders from these people?

The Witness: Yes, sir, we received orders and we made the merchandise up and then they would hang around waiting for shipping space on a boat and after a lengthy period of time, a number of requests by us asking those people, "When are you going to get the shipping space" there was no space.

The Court: Then what would you do with the

goods when y a didn't deliver them to these people?

The Witness: We would sell them.

The Court: Sell them to other accounts?

The Witness: That's right.

The Court: For export?

The Witness: We didn't inquire.

A. (Continuing) Next is invoice to the American-African Export Company for 420 cartons imitation jams. The explanation is the same as the prior one.

The Court: You received the order from that company.

The Witness: We had received the order. In this particular case we had submitted a pro forma invoice. The merchandise was never shipped because shipping space was never available.

A. (Continuing) The next is an order to the Treasury Department Procurement Division, Washington, D. C. for

75 jars of #10 jelly fruit red currant, which was delivered.

The next is an order to Pavia and Company for 800 cases assorted jams and jellies and a greater part of that was delivered. We delivered in this particular case, we delivered as much of the merchandise as we could in line with the shipping space that he got. I think of the amount 3700 represented on this invoice, I think about 2500 or 2600 was actually shipped.

Q. What are the dates of the applications that you have talked about? A. February 3, February 3 and February 9.

Q. 1943? A. 1943.

Q. Now, when you were talking about Colonial Stores, I understood you to say that the invoices that you looked at were delivered there. Is that what you meant to say? A. No, I meant the total number of cases shipped to Colonial Stores would add up to the total number of cases that we invoiced to the Colonial Stores; but the individual invoices may not coincide with the actual shipments. In other words we shipped Colonial Stores 30,000 cases. If I have a chance to look at these I can give you the exact amount—and we invoiced Colonial Stores for 30,000 cases and they paid us for 30,000 cases, but the invoices submitted to the board may not have coincided exactly with the method of shipment because if a truck would come to pick up merchandise and you had figured to put 600 cases on the truck and only could get 450 cases on the truck, you shipped the

balance in a further shipment; so that the only think we were interested in was to see that the number of cases in total tallied.

Q. And it is your statement that in total the amount that is indicated in these invoices, Colonial Stores, was shipped at some time or another and in various quantities? A. Yes, sir.

Q. You didn't send Colonial Stores invoices containing the name of—this is from Exhibit D-5 for identification—"The lot of Quartermaster Supply Officer, New Orleans, Louisiana"? A. No, sir.

Q. You did have that on all of these invoices addressed to Colonial Stores as submitted to the board, didn't you? A. Yes, sir.

Q. Where did you get that name from? A. The merchandise that was shipped to the Colonial Stores came out of a lot of merchandise that was shipped to the Quartermaster at New Orleans.

Q. What happened to it down there? A. This merchandise was shipped to the Quartermaster in New Orleans and was rejected by him.

Q. And returned to you? A. And returned to us.

Q. So that you then put that name on these invoices? A. That's right.

Q. And turned them into the board? A. That's right.

Recross Examination by Mr. Barshay:

—289—

Q. You were not authorized to do that by this company, were you? A. By Colonial Stores?

Q. Yes. A. No, sir.

Q. And that was a false thing you did, wasn't it? A. No, sir.

Q. Incidentally did you handle these matters that you speak of or did Leo Greenberg handle these matters? A. I handled them or I should say we both handled them.

Q. Your memory is better today than it was yesterday? A. I think it is about the same.

Q. Well yesterday you said you didn't have anything to do with that, in words or substance.

Mr. Hull: I object to that. He said he didn't have anything to do with the records.

The Court: The filing of the applications with the board.

Q. That's right. You had nothing to do with the filing of the applications, you said yesterday? A. That's right.

Q. Or the attachment of the invoices, right? A. The actual attachment?

Q. Yes. A. That's right.

Q. You had nothing to do with the presentation of the application? A. That's right.

Q. And you had nothing to do with the getting of the replacement certificates for these items? A. That's right.

—299—

Q. Isn't that what you said yesterday? A. That's right.

Q. Now overnight you discussed the case again with the District Attorney and his assistant and associate, isn't that so, or this morning? A. Yes, sir.

Q. All right. Now, you say that these applications and invoices are not false, is that your answer? A. I never said otherwise.

Q. You never said otherwise? A. No, sir.

Q. Now on December 11, 1943, before this very Court in the presence of this Mr. Hull, the Government counsel, did you not plead guilty to filing, showing and exhibiting to the said board on the 1st of February in the year of 1943 a false copy of a pretended invoice for products—

Mr. Hull: I object.

Q. (Continuing)—alleged to have been sold to the Pan-Continental Export Company?

Mr. Hull: I object. He did not plead guilty to any such thing.

The Court: He did not plead guilty to that. He pleaded guilty to a charge of conspiracy on December 11th.

Mr. Barshay: May I respectfully object to the Court's comment, sir?

The Court: I have judicial knowledge of it because the indictment is before me in this proceeding and the plea was made to me. Now did you plead guilty

to a charge as alleged by counsel?

The Witness: No, sir.

Mr. Barshay: Would your Honor please permit me to urge the point? Maybe I don't make myself clear.

The Court: You know what happened.

Mr. Barshay: Yes, I do.

The Court: As well as anybody and you know he did not plead to that.

Mr. Barshay: Well, that is where we differ, sir.

The Court: We don't differ at all. The indictment is here and this is the indictment he pleaded to.

Mr. Hull: And besides that—

The Court: The indictment is an indictment for conspiracy.

Mr. Barshay: Judge, isn't it a fact if you will permit me to ask you, that a man who pleads guilty to an indictment admits every allegation therein?

The Court: You asked him if he pleaded guilty to something that he did not plead guilty to. He pleaded guilty to a charge of conspiracy and you know it.

Mr. Barshay: I beg your Honor's pardon, sir. I press my position with all respect.

(Question repeated by the reporter.)

The Court: He has answered it no. Proceed to your next question.

—301—

Mr. Hull: I think there is altogether too much reference to the last trial.

The Court: I know there is and it is going to be stopped. All right, now, proceed to your next question. This question has been answered no by the witness.

Mr. Barshay: Will your Honor permit me to make an offer of proof?

The Court: Yes, you may make an offer of proof. Mr. Hull and the stenographer—

Mr. Barshay: I just want your Honor to give me protection in the record.

The Court: You have been given full protection in the record. I don't want you to insinuate that you haven't.

Mr. Barshay: Oh, no, no, sir.

The Court: I don't like these comments made for the jury before you come up to the side bar.

(The following proceedings took place at side bar.)

The Court: Now make your offer of proof.

Mr. Barshay: I offer to ask the witness this question: "Did you not on the 2nd of February—

The Court: And please don't give it so that the jury will hear it. Go ahead.

Mr. Barshay: "Did you not on December 11, 1945, plead guilty to having on the 2nd of February, in

the year 1943, made and caused to be made to the said board a fraudulent application for the replacement of 54,120 pounds of sugar."

The next question is—

The Court: Now, wait a minute. That question has already been answered by the witness, no.

Mr. Barshay: I didn't ask him that yet. I only asked him about Colonial.

The Court: Oh, all right.

Mr. Barshay: The next question—

The Court: You may ask the question, but I am telling you that I and you both know that he pleaded guilty to an indictment for conspiracy and that is all he pleaded guilty to.

Mr. Barshay: You see, Judge, the trouble is I can only ask one question at a time. When I finish this you will see my point.

The Court: I see your point now.

Mr. Barshay: You will see my point.

The Court: But you see what you are really doing—you know that to which he pleaded; you are asking him to draw legal conclusions as to the effect of the plea.

Mr. Barshay: I had hoped, your Honor, that you would explain to the jury the meaning of pleading to an indictment and every allegation therein and I

think that is the law whether he intends it or not. That is what he did.

The Court: You are not to ask him the effect of his plea. You may ask him whether he pleaded guilty to an indictment charging as this does conspiracy. You may not ask him, I mean with my permission, the effect of that.

Mr. Barshay: Let me finish my offer of proof, your Honor. I really regret—I didn't want the Court to be angry with me at all—"Did you not on December 11, 1945, in this very court plead guilty to having on the 9th of February, 1943, filed and exhibited to the said board false copy of pretended invoice for marmalades, jams and jellies alleged to have been sold and delivered to Pavia and Company".

The next question is, sir: "Did you not plead guilty to indictment charging you with conspiracy 3522c on December 11, 1945, which embraced these separate allegations in that very indictment from which counsel is reading and which is marked Defendant's Exhibit 3 in evidence."

The next question: "Were you not represented by counsel at the time of your plea and before your plea?"

The Court: Now you may ask—

Mr. Barshay: And I will offer proof. Now, your Honor, and I say this with all respect, in view of

—304—

what happened in the presence of the jury I move for a withdrawal of a juror and for a mistrial.

The Court: You will specify on what ground.

Mr. Barshay: What the Court said to me, the admonitions that the Court gave to me—I don't want to misquote, but whatever—

The Court: Go ahead.

Mr. Barshay: Whatever your Honor said to me.

The Court: With reference to the questions just asked of this defendant?

Mr. Barshay: Yes, whatever was asked from the moment I got up with respect to this point only—with great respect I say this, Judge, in the presence of the jury, both what the Court said and the manner in which the Court said it, it might well create a prejudice, your Honor.

The Court: I think your comments are entirely unfounded and I shall deny your request to withdraw a juror and declare a mistrial. In so far as the questions are concerned you may ask the question as to whether he pleaded guilty to that to which he actually pleaded guilty, the charge contained in indictment 3522c which is an indictment for conspiracy to defraud the United States.

Mr. Barshay: That is your limitation, sir?

—305—

The Court: That is my limitation.

Mr. Barshay: I take my exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Mr. Barshay: I want you to know, Judge, everything I say—

The Court: As I told you in the course of the trial counsel and the Court differ. You feel that You have a perfect right to do the thing which I think is entirely improper.

Mr. Barshay: You may be right.

The Court: I am the one who is ruling. You ask the question and insist on what you believe to be the protection of your client; you are within your rights in doing that. But I don't want you to do what I sometimes think is a deliberate attempt to make a deliberate misrepresentation. Now there is one pleading as to one indictment. He pleaded guilty to a charge of so and so; there was one charge made and that was the charge of conspiracy and I think when you go beyond that and ask did he plead, when you yourself know, you having been present,—that you can do nothing else except to attempt in the minds of the jury an impression of something which is definitely not true.

—306—

Mr. Barshay: Isn't it, your Honor—

The Court: Well, now, that is the ruling.

Mr. Barshay: All right, I respectfully except, your Honor.

(Exception previously noted.)

(Proceedings resumed within hearing of the jury.)

Q. Just answer this yes or no, Mr. Greenberg: Were you present in court during the last trial when the respective people whose names I mentioned on the invoices testified on behalf of the Government, yes or no? A. Yes.

Mr. Barshay: That is all.

Redirect Examination by Mr. Hull:

Q. Mr. Greenberg, when the word Quartermaster—

The Court: Look, don't let's go on endlessly in this thing.

Mr. Hull: Just one question.

The Court: I will allow you one question and no more.

Q. When there was placed on these invoices, "Colonial Stores," "the lot of Quartermaster Supply Officer, New Orleans, Louisiana," on each one of them that was false, wasn't it? A. That statement is not false but the implication of it is false.

Mr. Hull: I see. All right, that is all.

Recross Examination by Mr. Barshay:

—307—

Q. Mr. Greenberg, wasn't the intent of you and your brother who both, as you say, filled out and filed the applications and the invoices, to obtain replacement certificates from the ration board with those applications which you were not entitled to at the time of the filing? A. No, sir.

The Court: Well, the implication of that conclusion as you have said was false, wasn't it? You put it on there to mislead the board?

The Witness: No, sir.

The Court: Well, what implication was false then?

The Witness: Can I look at that again? This merchandise came out of merchandise that we had shipped to the Quartermaster at New Orleans. Whether or not we were entitled to a replacement, because of the fact that it had been rejected and then shipped to the Colonial Stores was something that we weren't sure of at the time we made the application.

The Court: But you put it on there to give the implication that you were entitled to this extra allotment of sugar?

The Witness: That's right. Whether or not we were, we didn't know. We left that up to the board.

By Mr. Barshay:

Q. But you are the one who chose that name, "Quartermaster"? A. Well, that actually was merchandise that was

shipped to the Quartermaster.

Q. Not as mentioned in the invoices? A. Oh, yes, in the exact form in which it was mentioned in the invoices in #210.

The Court: But it had been rejected and you disposed of it somewhere else which was not to an exempt body?

The Witness: That's right.

The Court: And on the ground that it had been sent to the Quartermaster, even though it was rejected, you applied for replacement?

The Witness: That's right.

Mr. Barshay: That's all.

HAROLD R. LEHMANN, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. You are a captain in the United States Navy, are you not, sir? A. Captain, Supply Corps, U. S. Navy.

Q. Where are you stationed at this time? A. Naval Purchasing Office, New York.

Q. What is your function? A. To supervise the purchase of all materials required by naval activities in this area and some Army areas and overseas.

Q. Does that include Brooklyn Navy Yard? A. Yes, sir.

—309—

Mr. Barshay: Pardon me. At this time may I again enter my preliminary objection as heretofore urged with respect to the other witnesses?

The Court: Yes, same ruling. You may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Q. What records are maintained in your office concerning all purchases for the Navy Department for delivery to the Brooklyn Navy Yard? A. The records of all purchases in excess of $500 or groups of purchases in excess of $500 where formal contracts are executed.

Q. They are kept there? A. They are kept there.

Q. Does the Navy make purchases of amounts of supplies for less than $500 in some other way? A. Occasionally they do make purchases but if an activity requests a group of purchases that amounts to $500 a formal contract is executed.

Q. In every instance? A. In every instance.

Q. Is that a requirement? A. That is a requirement.

Q. And then the records get to your office? A. The records originate in our office.

Q. Have you examined the records of your office for the years of 1943 and 1944—I will include 1942—to determine whether there were any purchases made by the Navy

—310—

Department for delivery to the Brooklyn Navy Yard of

syrup from Robert Sealfon or the Sero Syrup Company? A. Yes, I have examined the books.

Q. What did you find? A. There were no records of any purchases made from either firm.

Q. Were there records of any purchases in either name— A. No.

Q. —of any product or commodity whatsoever? A. No.

Mr. Hull: Cross-examine.

Cross Examination by Mr. Barshay:

Q. That is the same testimony, sir, you gave on a prior occasion?

Mr. Hull: I object.

The Court: I wish you wouldn't be referring to the same testimony. If it isn't the same you have the record and you may take the record and question him on it. There is no need of harping continually on the fact that there was another trial and the fact of whether he gave the testimony at this other trial is not material, unless there is a divergence. If there is a divergence you may take the record which you have and question him on it.

Mr. Barshay: May I make my position clear; with the greatest respect to the Court I think that, under the law the only way to establish the record,

sir. I didn't cross-examine him last time and the Court and Mr. Hull knows that—

The Court: Well why do you harp on the same point that he gave the same testimony the last time?

Mr. Barshay: It is not harping. I am trying to establish the legal point.

The Court: Well, you established the legal point with me and you have done it a dozen times and I have ruled on it, Mr. Barshay. Now you needn't ask any further witness whether it is the same testimony given at another trial because that is now pretty well established and published that there was another trial in which this witness testified. Now if this a legal point, you needn't play on it before the jury. You have argued it with me.

Mr. Barshay: Your Honor, I assure you that I have asked your permission at the beginning of the trial whether I could make that point and that you outlined the matter and I said that was the procedure I would follow and if I thought your Honor did not want me to do it with every witness I would not have done it.

The Court: We discussed the fact as to whether or not it was necessary to make the same objection and I said, "You may make your objection in one statement or else you can make it as you please before each witness goes on the stand." That related

to the effectiveness of their testimony and its admissibility on a legal principle which had been argued.

Now there is no need going beyond that and saying "Is it the same testimony given at another trial?"

Mr. Barshay: It was with no intent, your Honor, you understand.

The Court: Well, I don't know what your intent was.

Mr. Barshay: Except to make the record as I think the law is and if your Honor protects my record, sir, it will not happen again.

The Court: Your record is protected to the limit. You have been in and out of time as I conceive it, referring to the other trial, the other trial, the other trial. It doesn't make any difference what any witness testified to at another trial unless there be a conflict. If they testified at another trial and their testimony is different you know the method of procedure, but it is perfectly pointless to ask whether this is the same testimony given at another trial.

—313—

Mr. Barshay: Your Honor, there are two reasons in my opinion for asking that question. One is, as you say, which I do not contest—that he changed a single word of testimony; and the other reason is the one we have often discussed during the trial.

The Court: Which you say is a legal point.

Mr. Barshay: Yes.

The Court: And therefore need not be discussed in the presence of the jury. We have been over that and your rights are protected. If I am wrong I have declared it at least twenty times, the ruling which

you have sought and asked for. Now, it does seem to me that this continual asking of witnesses, "Is this the same testimony you gave in the other trial?" with no attempt to combat it is immaterial and irrelevant.

Mr. Barshay: If your Honor had said that to me in the beginning you can rest assured, sir, that it never would have been repeated; the record would have been protected once and for all.

The Court: All right.

Mr. Barshay: But at this late stage of the proceeding, when you say that to me, I must explain to you that there was no intent to have any effect on the jury at all.

The Court: Well, you said, yourself, it was a legal question.

—314—

Mr. Barshay: Yes.

The Court: Then why bring it out before the jury?

Mr. Barshay: Where else could I do it, sir? Must I ask permission to step to the side of the bar on every point?

The Court: Is that question a factual question which the jury is entitled to consider?

Mr. Barshay: Well, you said no.

The Court: No.

Mr. Barshay: But I must have it in the record some way.

The Court: You have had it in the record time and time again.

Mr. Barshay: And I now bow to your admonition, which I will respectfully and gladly heed.

The Court: All right.

Q. Officer, do you know whether or not in addition to the purchases made by the United States Navy, the Brooklyn Navy Yard, there was an arrangement made by the authorities there granting a concession to civilians for the use of civilian help and employees at the Brooklyn Navy Yard to make purchases directly for those civilians, which had nothing to do with the United States Navy? A. I have no knowledge of other than official purchases.

Mr. Barshay: All right.

—315—

Redirect Examination by Mr. Hull:

Q. And you have knowledge of any purchase that would be exempt, have you not? A. Yes.

Mr. Hull: That's all, Captain.

I would like to have a moment's indulgence, your Honor.

The Court: I think it is about time to have our five-minute recess, now, so the jury will be excused first.

(At this point a short recess was taken.)

Mr. Hull: At this time, your Honor, the Government rests.

(Discussion at side bar off the record.)

The Court: We will excuse the jury for a moment. I am sorry I did not know this before I brought you in.

(The jury withdrew.)

Mr. Barshay: With your Honor's permission, first I move to dismiss the indictment on the ground that the Government has failed by credible and believable proof to establish a prima facie case.

Second, I renew my motion to dismiss the indictment on the same grounds that I urged or that were urged on my behalf at the opening of the trial. Generally speaking, I raised the question of double jeopardy because of the particular circumstances of

—316—

this case and the points of res judicata which I urged in support of my plea in bar.

I should add an additional argument to the ones already given.

The Court: Well, now, is there any other ground, before you argue?

Mr. Barshay: Yes, yes.

The Court: You see, what I want is to get the causes first and then your argument later.

Mr. Barshay: I move to dismiss the indictment on the further ground, sir, that it appears affirmatively now that the matters were presented to a board which had no longer jurisdiction to act after July 1st and August 1st, 1943, and therefore the United States Government could not have been defrauded. And as authority for that, sir, I cite the case of

United States v. Barnhart in 33 Fed. Reporter at page 464.

And I move further on the ground that now it affirmatively appears that the issues which were presented here are identical with the issues that were tried and determined necessarily in the conspiracy indictment, 3522c.

And I move further on the ground, sir, now there is a reasonable doubt as a matter of law.

I move for a direction of verdict of not guilty

—317—

on all those grounds.

The Court: All right. Now I will hear you.

Mr. Barshay: Now, the additional argument, sir, on the question of what the jury decided in that case, in view of the Court's comment during the argument that there is no way to tell what the jury decided on in the last case, I read the minutes, sir, and I should like to refresh the Court's recollection, that in that trial the defense conceded, one, the writing of the letter, two, the transmission of the letter, March 3, 1943; the filing of the false invoices by the Greenbergs was not contested; the receipt of the merchandise from the Greenbergs was conceded; the fact that no merchandise obtained from the Greenbergs was sold to any exempt agency, more specifically to the Brooklyn Navy Yard; the fact that Sealfon never sold to any exempt agency at all. Which left the jury just the issue of whether or not the giving of the letter was with an unlawful intent, from which fact and other facts the jury can infer that there was a conspiracy to defraud the Government.

That was the only issue, sir, and that having been decided on December 19, 1945, not guilty, that being the only issue, it bars further prosecution with respect to those issues.

That's the additional ground, the additional argu-

—318—

ment, sir, that I have to make in addition to those already made.

The Court: That's on the question of the double jeopardy and res judicata.

Mr. Barshay: Res judicata.

The Court: Res judicata.

Mr. Barshay: Yes.

The Court: All right. Now how about the other argument? Did you want to argue further on the question of the effect of the appearance of matters that were presented to a board which had no authority to act?

Mr. Barshay: Yes. The Order 11—May I ask your Honor, is that in evidence? I don't know. Order 11, is it in evidence?

The Court: Yes, I think it is part of the—

Mr. Barshay: Is it, Mr. Hull?

Mr. Hull: No, sir.

The Court: Isn't it?

Mr. Hull: It is only an exhibit for identification. It was not the purpose of the Government to have the jury use it.

The Court: It wasn't in evidence?

Mr. Barshay: It was left out of my papers, sir.

Now would you permit me to have that offered in evidence?

Mr. Hull: I don't think it is a proper—

—319—

The Court: No, I don't think it is your time now. If you go to your defense, it may be offered in evidence.

Mr. Barshay: Well, in order to support my contention now, sir, I thought it was part of the papers that Mr. Quick testified to, but last night—

The Court: He did testify,—

Mr. Hull: Your Honor, my position is that the Court can always take judicial notice of such orders.

The Court: I can take judicial notice of it.

Mr. Hull: The only thing—

The Court: And there was testimony by the Government expert that the effect of Order 11 was to end the authorization of the board to issue certificates.

Mr. Hull: Yes.

The Court: For replacement.

Mr. Hull: He said that if they were issued they would be legal, but that the board didn't have the authority.

The Court: He said they would be unauthorized but legal.

Mr. Hull: Legal but unauthorized.

Mr. Barshay: May I ask—

Mr. Hull: My only thought—

The Court: Wait a minute. Let Mr. Barshay finish.

Mr. Hull: Yes.

—320—

Mr. Barshay: I ask your Honor to take judicial notice of the issuance of Order 11.

The Court: Of Order 11 and its effect.

Mr. Barshay: And so I urge, sir, that in view of the fact that that board acted without authority, it is of no consequence that some expert gives it a legal interpretation; your Honor is not bound by that; after all, you are the one to make that decision. So that they having acted without authority, in violation, I may say, of law, and an order of an agency of the United States Government, therefore there could not have been any defrauding of the United States Government.

The Court: Well, weren't there some certificates and requests filed previous to the issuance of Order 11?

Mr. Barshay: They were, yes, your Honor; only on the theory of a similar scheme, of similar acts; but the indictment charges us with twelve counts subsequent to July 1st, 1943.

The Court: Subsequent to that.

Mr. Barshay: That's right.

The Court: Yes.

Mr. Barshay: So that we are only concerned with what is alleged in the indictment. I know that you will tell the jury that the others are only for the purpose of showing absence of mistake and so forth,

—321—

but in view of the fact that we concede all that and

do not make an issue of those things, sir, it is irrelevant.

The Court: All right, Mr. Hull.

Mr. Hull: I sent for the statute, your Honor. I will have it here in a moment. But the position of the Government is that it makes no difference whatever whether the board had authority to issue the orders. The offense that is prohibited by Title 18, Section 72, is the filing of something for the purpose of defrauding the United States. It doesn't have to be filed with a Government agency at all. It can be filed, as in FHA cases, with a bank in connection with an application for a loan, or with a private individual.

The Court: Yes, but there the bank would be in a position to grant the loan on that application.

Mr. Hull: Well, yes, sir, but the gist of the offense under Title 18, Section 72, is the filing for the purpose of defrauding the United States, and there is no limitation in that statute as to the place where the filing is to be, and there is nothing in the statute that requires the authority to issue, for violation under that section. You consider that in conjunction with Title 18, Section 80, for instance, and there you will see the other side of the picture. Under Title 18, Section 80 the authority has to exist, but that's

not in Title 18, Section 72.

The Court: Yes, but as I understand the gist of Mr. Barshay's objection it is this: that the Govern-

ment cannot be defrauded if the agency to which the representation was made has no authority to do something which will cause the Government to be defrauded. In other words, the defendant Sealfon, taking it at its worst, if he did aid and abet, aided and abetted the filing of a request for replacement which the board had no authority to give, that therefore no function of the United States Government effectively was hampered, because if the board had no authority—am I stating the substance of your argument, Mr. Barshay?

Mr. Barshay: Yes, your Honor; yes, your Honor, plus the fact that—

The Court: If the Board had no authority, then any action that it took was not in derogation of a function of the United States Government.

Mr. Hull: Well, of course, that's his reason, but it isn't sound, because in the statute, where it says whoever files something for the purpose of defrauding the United States, the test is not whether the recipient of the paper or writing filed has authority—

The Court: Well, suppose someone filed a forged document or a fraudulent document with the Col-

lector of Internal Revenue and asked him to issue a sugar replacement. The Collector would have no authority. Would you say then that this was a situation such as envisaged by the statute, that it was a

document which was filed for the purpose of defrauding the Government of the United States?

Mr. Hull: I wouldn't answer that until I saw what the developments were; because from the facts as they develop you must see whether the intention to defraud the United States existed; and you can tell from the facts and circumstances that developed. You can also tell whether there was an accomplishment of the purpose of defrauding the United States.

The Court: Well, do you contend that accomplishment is necessary in a case of this kind?

Mr. Hull: I do not; I do not, but it is—

The Court: How does the accomplishment lend any sanction or color to the act itself?

Mr. Hull: Except to show that the intention existed.

The Court: But here the United States Government was not defrauded of sugar.

Mr. Hull: It was defrauded.

The Court: It was defrauded of its right, if there was any fraud at all, of its right to have it functions and its laws observed.

—324—

Mr. Hull: The regulations pertaining to sugar replacement were promulgated for the sole purpose of protecting the supply for the United States Army and the United States Navy, and a diversion of sugar from that purpose, such as existed in this case, is a direct fraud upon the United States Army and Navy.

The Court: Well, that's not the only purpose of it. It was also to preserve an equality in the civilian allotment of sugar.

Mr. Hull: No, sir, that was not done by the replacement program.

The Court: What?

Mr. Hull: That was done by the basic quota program.

The Court: Which was part of the whole situation.

Mr. Hull: But the replacement program was separate—

The Court: But you can't just arbitrarily disassociate one from the other.

Mr. Hull: Well, I think you must, sir.

The Court: No. And your contention is not that the Government was defrauded of sugar, but that it was defrauded of its right to have the regulations which were established as the result of congressional action observed.

Mr. Hull: Well, it does not depend, sir, I maintain it does not depend upon the authority existing in the

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—325—

The Court: Well, suppose the documents were filed and there was no sugar actually secured? Would there then be a violation of the statute?

Mr. Hull: Yes, sir, there would.

The Court: All right. Then, as I say, the success of the attempt does not lend color one way or the other.

Mr. Hull: No, except by going back to establish the intent that existed in the first place.

The Court: The intent. But then you are up against the difficulty of whether if an attempt is made to do something which the law does not provide for, that is a violation of this statute. Now the board, as a matter of regulation, had no authority to issue the certificates after July 1st. That's true, isn't it?

Mr. Hull: That's correct.

The Court: The attempt made,—taking for granted the Government's contention, and taking for granted that Sealfon did actually aid and abet, what actually was done, with that accepted, was that an attempt was made to have a board which had no authority to issue sugar replacement—

Mr. Hull: There is nothing in the statute nor in any—

The Court: Well, take my case; suppose these were presented to the Commissioner of Internal Revenue.

—326—

Mr. Hull: Yes, sir.

The Court: He had no authority to issue them.

Mr. Hull: That's right.

The Court: The board had no authority to issue them.

Mr. Hull: It wouldn't make any difference.

The Court: Or if it were filed with the Interstate Commerce Commission.

Mr. Hull: I don't think it would make a bit of

difference. The offense is complete and is not depending on the authority. If something false is filed with the intention of defrauding the—

The Court: Filed where?

Mr. Hull: Any place.

The Court: Suppose it were filed with the Chief of Police across the street.

Mr. Hull: I think perhaps a jury in that situation might find that no intent existed to defraud the United States.

The Court: And you think that would establish a prima facie case?

Mr. Hull: It is a question of whether there was an intent to defraud the United States. And if you file it anywhere with that intention, you violate the statute. But it all gets back to the question of inten-

tion, and that's what we have got to find. Now, there is less likelihood as a factual matter that a jury or a court would find as a matter of fact that the man had intent to defraud the United States if he filed it with the Chief of Police of the local municipality, because it would seem to be apparent that it would be an idle gesture. But there was no such thought as that in this case. Greenberg, the man that carried through this whole thing with Sealfon, said that he didn't know about the regulation; it wasn't in his mind and couldn't have been in Sealfon's. They were doing something that was going to lead toward the accomplishment of defrauding

the United States, and there was every good reason for both of them to expect that that would be accomplished by filing these papers with the Rutherford Rationing Board.

The Court: Which had no authority to issue these.

Mr. Hull: They didn't know that.

The Court: Well, is it a question of their knowledge which is determinative?

Mr. Hull: It is a question of their intention, sir. The statute says—

The Court: I know, but it is a question of the knowledge of the board?

Mr. Hull: I am sorry, sir?

—328—

The Court: Is it a question of knowledge of the board? Is that determinative?

Mr. Hull: No, sir, the knowledge of the board wouldn't enter into it.

The Court: Well, what do you concede to be the basis of the charge as alleged in the indictment?

Mr. Hull: The filing—let me have the indictment. I underlined the essential elements in the first count and I think they are the following:

"for the purpose of defrauding the United States, they did utter and publish as true, and cause to be uttered and published as true, certain false writing, the said defendants knowing the same to be false, forged and counterfeited."

That, I think, is the gist of the offense.

The Court: You don't think it makes any difference where it is filed?

Mr. Hull: No, sir. That only reflects back on the question of intention. You have got to find that there was an intention to defraud the United States before this statute can be violated, and where it is filed will only help the Court or jury to see that and nothing else.

The Court: What was the citation you gave me?

Mr. Barshay: I have it right here, 33 Federal, at page 464, your Honor, the reargument of that case.

The Court: Is that U. S. v. Barnhart?

Mr. Hull: Yes.

The Court: I will take this matter under advisement at the moment and we will recess. I shall communicate with your office this afternoon, Mr. Barshay, on my determination.

Mr. Barshay: Would you want a short memoranda over the week end?

The Court: Have you one?

Mr. Barshay: Not now.

The Court: The only thing is I want to determine it as quickly as possible. If you could have it here by Monday.

Mr. Barshay: A memorandum?

The Court: Yes.

—330—

Mr. Barshay: Oh, surely.

The Court: Have it here by Monday and then if it is determined adversely to you would Monday

afternoon be time enough for you to make your preparation?

Mr. Barshay: Oh, surely. At 468 I think is the determining decision of the Court, bottom of the page.

The Court: Just offhand I would say that where the Court says, "Nor in my judgment could such action have materially aided in producing such result." As a matter of fact in this particular case it did materially aid.

Mr. Barshay: Yes, but as your Honor suggested yourself—

The Court: Well, suppose you submit the memorandum and if you mail it to me tonight I will get it tomorrow morning.

Mr. Barshay: Will you let me mail it tomorrow?

The Court: Yes, mail it tomorrow and I will have it the first thing Monday morning.

Mr. Barshay: May I add one more ground?

The Court: Yes.

Mr. Barshay: Very short.

The Court: Yes.

Mr. Barshay: I move to dismiss the indictment on the ground that the proof here established by con-

cession of the District Attorney or the Government, rather, is that the product which Sealfon purchased from the Fresh Grown was a non-rationed product and did not come within the purview of any regulation of the United States Government.

The Court: All right.

Mr. Corcoran: If your Honor please, may we have the privilege of submitting a memorandum between now and Monday on that particular question?

The Court: Yes, if you will submit the memorandum and not wait to receive the copy of Mr. Barshay's memorandum. All witnesses subpoenaed in the case of the United States vs. Sealfon will return on Tuesday morning without further notice.

(The jurors resumed their seats in the jury box.)

The Court: Ladies and gentlemen of the jury, counsel for the defense have a compelling engagement, the compulsion of which the Court recognizes, for this afternoon; so that we will recess now until Tuesday morning at ten o'clock at which time you will be here ready to resume the hearing of this case. Meanwhile do not discuss it with anyone and do not permit anyone to discuss it with you. You will now be excused until Tuesday morning at ten o'clock.

(Adjourned to Tuesday, January 15, 1946, at 10:00 A. M.)

—332—

Newark, N. J., Tuesday, January 15, 1946.

(Trial resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: At the last session of court, Mr. Barshay, you made certain motions, and a memorandum was submitted and I communicated to yesterday my determination. I shall now, for the sake of the record, say that I have denied your motion and you may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

The Court: And I might tell you, ladies and gentlemen of the jury, that in so far as the Court's rulings on any of these motions directed to the law are concerned, you must not let it affect you one way or the other. It is purely my concern. That which concerns you will be indicated to you, but don't be affected by any rulings made on any of these motions.

Mr. Barshay: May I proceed, your Honor?

The Court: Please.

Mr. Barshay: Mr. Hull, may we speak to you for one second, sir?

The Court: Yes.

(The following proceedings took place at side bar.)

—333—

Mr. Barshay: I offer to open to the jury on the theory that the issue of Sealfon's participation in the crimes charged in this indictment was present in and material to the trial for conspiracy heretofore tried, and which resulted in the jury's verdict of acquittal in favor of Mr. Sealfon and conclusively answered that issue adversely to the Government—

The Court: As to the issue now.

Mr. Barshay: Adversely to the issue now in the present indictment, and so as to have the record complete, the same ruling with respect to summation if we have to sum up, and exception.

The Court: Yes, and the ruling is that I will not permit that because I don't think it is proper either in the opening to the jury or on summation. Counsel may have an exception to both rulings.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

Mr. Barshay: And that I will not be able to refer to the record of the last trial.

The Court: That you will not be able to refer to the record of the last trial in these terms, yes.

(Proceedings resumed within hearing of the jury.)

Mr. Barshay: May I have your Honor's permis-

sion Madam Foreman and ladies and gentlemen of the jury, just as the prosecutor opened up to the jury at the commencement of this trial for the purpose of outlining his prosecution to you, I shall now make my opening address to the jury which will be brief, in order to outline my defense to the charges set forth in the indictment.

I don't come forward with this proof to prove my innocence because that is not necessary under the law, but merely to give our version of the accusation; and I shall present proof to you that my client, Robert Sealfon, is 37 years of age, married, the father of two children; that he was born in Tyrone, Pennsylvania, he was educated there and in Altoona, Pa. as far as the high school of that town; that in 1933 for the first time he came to the State of New York and there he commenced to engage in the syrup business and that for a period of almost ten years he did in the Borough of Brooklyn. That he had never known Fresh Grown, he had never known the Greenbergs, he never had any business with them of any kind, nature or description, and I shall prove to you that he had a friend by the name of Sanford Doctors who was at the time working for Kraemer and Company, a sugar brokerage concern in New York, but that Sealfon had no business whatever with the Kraemer Company. His relationship with Doctors was purely social.

—335—

I shall prove to you that Mr. Sealfon, among other things, was engaged in selling a syrup to an automatic canteen company who had some kind of an arrangement at the Brooklyn Navy Yard in Brooklyn and with some defense plants. I shall prove to you that it was pursuant to that arrangement that Sealfon sold some of his syrups to the canteen who had a warehouse in New York, and some of it to a warehouse which they had a right to have, by authority of somebody in the Navy, in the Brooklyn Navy Yard, where they had the right to have a certain kind of machines like Coca Cola machines which you see around and to which Mr. Sealfon served syrups in the Brooklyn Navy Yard to that canteen. But he had absolutely nothing to do with the Brooklyn Navy Yard itself, that he sold nothing to the Brooklyn Navy Yard, nothing at all to the Brooklyn Navy Yard as the Navy Yard.

We shall prove to you that there came a time when Sanford Doctors approached Mr. Sealfon and said to him, "I have someone who can sell imitation vanilla syrup which is a non-rationed product. Could you use it," and of course Mr. Sealfon said yes. You appreciate the conditions that existed at that time; and after discussions and arrangements the details of which will be told to you from the witness stand, a deal was consummated whereby for the very first time Mr. Sealfon went to Lyndhurst and there for

—336—

the very first time on January 15, 1943, he met Mr. Murray Greenberg and he brought with him two certified checks drawn upon his own concern made out to his own order, and endorsed those checks to Mr. Greenberg in payment of the first load or two that was sold by the Fresh Grown Corporation to Sealfon. And in that isolated transaction on January 15, Mr. Sealfon used a truckman by the name of Seidenberg. That thereafter we shall prove to you there was another transaction between the Greenbergs and Mr. Sealfon and in the meantime Mr. Sealfon through his own broker, B. W. Dyer and Company at 120 Wall Street, New York, made arrangements to sell imitation vanilla syrup to the National Biscuit Company of New York. And so, when he obtained the merchandise from Fresh Grown, the truckman who was engaged by Sealfon, Citron and Kranski, whom he never knew before that transaction, was engaged to deliver the identical imitation vanilla syrup, to haul it from Lyndhurst, New Jersey to the National Biscuit Company to the extent of 98 per cent of whatever was delivered. The other 2 per cent was sold to other corporations like the American Tobacco Company and the Loft Company.

We shall prove to you as we already have that not one drop of the Fresh Grown Preserve Corporation vanilla imitation syrup or any of its mer-

—337—

chandise was sold by us to any exempt agency whatever. There isn't any question about that.

We shall prove to you that there came a time when young Doctors conveyed to Mr. Sealfon a message that Greenberg wanted a letter and then Mr. Sealfon, in the course of events, met Mr. Greenberg himself. We shall tell you the reason why and the time and place as approximately as we can and there was a discussion about this letter the details of which will be submitted from the witness stand under oath.

We shall prove to you how the letter came to be written, that it was not written with any intent whatever or pursuant to any arrangement or scheme for any unlawful purpose, as set forth in the indictment.

We shall prove to you that we hadn't the slightest knowledge of what Greenberg intended to do with that letter. We didn't know it, we didn't approve it, we didn't consent to it. We shall prove to you that the letter we wrote was true in every respect.

We shall prove to you that contracts were drawn in a lawyer's office between the Greenbergs and Sealfon. We shall prove to you that there came a time when Citron demanded, or rather of Citron was demanded the payment of cash instead of the certified checks, which to a certain point had been paid by the

defendant Sealfon; that the message was conveyed to Mr. Sealfon by Mr. Citron and while we changed the mode of payment from certified checks to cash, we don't know what was in the mind of the Greenbergs.

We shall prove to you that Sealfon continued to

record every single transaction had between the Fresh Grown and himself and the system was adopted whereby the checks were made out to Citron from the very accounts kept by Sealfon, every single entry, as already has been testified to by Mr. Wedel, a Government witness. Citron would take a check for the amount of payment of this syrup and in addition to his trucking charges, cash it at the bank, take the cash over, deliver it to one of the Greenbergs and get his load; deliver the load directly to the National Biscuit Company to the tune of 98 per cent, get a receipt from the National Biscuit Company for every item, take that receipt, transmit it to Sealfon; Sealfon would enter it in his book, bill the National Biscuit Company, receive a check from the National Biscuit Company and deposit it in his account.

We shall show you that not one drop ever purchased from Fresh Grown, whether paid for in cash, whether paid for by check in the manner described to you, was ever omitted from the regularly kept original records entered on the stubs of every check as we have described to you.

—339—

We shall prove to you that we gave unto Citron a check, he signed a purchase order, an original, indicating a receipt for the amount, and we gave to him a duplicate. We gave him no instructions whatever with respect to the use of the duplicate.

We shall prove to you that there came an occasion when Citron reported that one of the Greenbergs demanded that he sign and he did sign on a half dozen

occasions or so, more than once, without a carbon copy between, and that it was called to Sealfon's attention, and he instructed Citron never to do that again, unless there was a carbon copy between or the word "duplicate" was written on the second copy, and the word "triplicate" was written on the third, if such was the situation.

We shall prove to you that Mr. Greenberg falsified in the following manner: that he took obvious, simple truths and built false fact thereon to implicate and get revenge on Mr. Sealfon, for a very purpose which I shall illustrate later on in the case.

We shall prove to you that Sealfon never received one single cent from Mr. Greenberg at any time or at any place, not one single cent; that it is a complete fabrication; we shall prove it to you.

We shall prove to you that we never discussed with Greenberg or anyone the manner that Greenberg

—340—

was to use in defrauding the ration board; that Sealfon was never to the ration board, never saw an invoice, never knew of the arrangement, never knew of a single transaction that Greenberg had at the ration board, never communicated with the ration board, never was there, never asked any question, never signed a single word which went to the ration board. We shall prove to you that the letter which we sent was never shown to the ration board, as has already been proved; that it had nothing to do with it at all.

We shall prove to you that before the letter was written, Greenberg had already, by the very same scheme in a different way, defrauded the ration board by exhibits which are now marked for identification and will go into evidence.

We shall give you every available fact that we have, and we shall present to you men who will testify to the good character of the defendant Sealfon, all in the hope that at the conclusion of the case when you shall have received from his Honor the law to apply to this case, you will make it possible for your foreman to say that there is a reasonable doubt of the defendant's guilt.

Lieutenant Fox.

—341—

IRVING FOX, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Lieutenant, are you here at the direction of and with the knowledge and consent of your commanding officer? A. I am.

Q. Where are you stationed, sir? A. At the New York Navy Yard, Brooklyn, New York.

Q. Lieutenant, do you know whether or not there was a food service executive committee in the Brooklyn Navy Yard sometime in 1942 and '43? A. Yes, there was.

Q. And do you know whether or not they were authorized to make an arrangement with some civilian concern known

as the Automatic concern for permission to put in the canteen for civilians at the Brooklyn Navy Yard certain machines to sell soft drinks? A. They were.

Q. And that that was done under the supervision of this committee? A. That's right.

Q. Is that correct? A. That's correct.

Q. And that had nothing to do with the Navy Yard itself? A. No.

Q. Or Navy personnel, soldiers, sailors, or marines, isn't that so? A. That's correct.

Q. And the Navy Yard, I take it, employs a great many civilians that have a direct connection with the building of

—342—

ships and so forth. A. That is correct.

Q. But nothing to do with the official personnel. A. That is also correct.

Q. Is that right? Now, do you know whether or not the industrial relations head, Captain Hubbel, in the Brooklyn Navy Yard had an arrangement with the Automatic Vending Machine during 1942, '43 and '44, whereby civilians were permitted to make purchases from these vending machines of soft drinks? A. The industrial relations head, Captain Hubbel, allowed these machines to be installed at the Navy Yard for the use of civilian personnel.

Q. And for which the Navy got some kind of a commission? A. That is correct. Not the Navy—the food service executive committee.

Q. The committee, that is right. In other words, they had nothing to do at all with the operation or the supplying of those machines or the filling of them? A. No, sir, nothing at all.

Mr. Hull: Does that "they" in that question mean the Navy?

Mr. Barshay: The Navy.

That's all, Captain.

Mr. Hull: No questions.

Mr. Barshay: Mr. Brock.

—343—

Louis Brock, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Mr. Brock, what is your position? A. I am the drink manager of the New York Automatic Canteen.

Q. And is that a New York corporation? A. That's right.

Q. And operates in various places in New York? A. That's right.

Q. Will you explain to the Court and jury, please, your manner of operation with respect to the sale of your machines and the servicing thereof? A. Well, we have a warehouse in the Brooklyn Navy Yard proper. We have a manager and we have service personnel and maintenance personnel. The syrup is shipped from Sero warehouse to our Brooklyn Navy Yard warehouse which in turn the service personnel take it out and fill and take out the cash from the various vending machines.

Q. Now that has nothing to do with the Navy Yard officials themselves, has it? A. No, it has not.

Q. And you pay a commission or your concern pays a

commission to the committee of the Navy Yard for that privilege? A. That is right.

Q. It is not operated by any officers or personnel of the Brooklyn Navy Yard itself? A. No, it is not.

Q. And how long have you done business with defendant Sealfon? A. To my knowledge about four years.

—344

Q. And you had a contract with him? A. No.

Q. You had some arrangement with him, didn't you? A. That's right.

Q. Now, Mr. Brock, did you bring your records along? Did you? A. I did.

Q. Some of the records? A. Yes, that's right.

Q. All of your records looked over by the Government representatives? A. That's right.

Mr. Hull: I don't know what that means.

Mr. Barshay: Well, I will elucidate, Mr. Hull.

Q The same records that you have here have been looked over by the Government representatives? A. Not this book (indicating).

Q. Didn't you have it here before, sir? A. Yes, we had it here before.

Q. Now did you bring the records for the month of January 1943? A. Yes, I have them.

Q. Will you turn to January the 7th, 1943? A. This book starts January the 11th.

Q. January the 11th, 1943? A. That's right.

Q. Well, permit me to show you, sir, a piece of paper, and ask you to look at it and see whether or not you recognize it. A. Yes, I do.

Q. What is that, sir? A. That is a signed receipt by our stock clerk at the Brooklyn Navy Yard for receiving syrup

from Sero Syrup Company.

Q. And what is the date thereof? A. January the 4th, it looks like.

Q. Will you look at it closely, please? A. (The witness handed the paper to examining counsel.)

Q. January 4th, 19— well, the writing isn't clear.

Mr. Barshay: Mr. Hull, will you look at it? Maybe we can agree on it.

Mr. Hull: Would you say '43?

Mr. Barshay: That is my impression. It is obviously '43. It doesn't amount to much.

Mr. Hull: That doesn't look like '43; it looks like '42, to me.

Q. Have you a record, sir, of a shipment by the Sefo Syrup to the Brooklyn Navy Yard of January 4, 1943? A. No, I don't. I have my first receipt book here on January 14th of '43.

(Counsel conferred aside.)

Mr. Barshay: Do you want to consent to it?

Mr. Hull: Well, I consent to what they show, but I can't say that that looks like '43 to me.

The Court: Let me see it.

Mr. Barshay: Yes.

(Colloquy between the Court and Mr. Barshay at side bar off the record.)

—346—

Mr. Barshay: Will you permit me to explain it, Judge?

The Court: Yes.

Mr. Barshay: Now, it is marked—

The Court: I will say, Mr. Barshay, that that date looks like January 4, 1942, but if there be any other evidence that it corresponds to the 1943 date, we can keep in mind the fact that a great many of us for the first four or five or six, eight or ten days of January date it back to the year before.

Mr. Barshay: That's right.

Q. Now look at this slip attached to that document just described and see whether or not the items mentioned in that slip correspond with one which is January 4, 1943. A. That's right, they do. 16 gallons of grape syrup and 16 gallons of cherry syrup.

Q. And what is that slip attached thereto dated? A. January the 7th.

Q. Nineteen hundred and what? A. And forty-three.

Q. Now is that slip in the nature of a bill for merchandise previously shipped? A. That's right.

Q. Now I show you a slip dated January the 7th or the 8th, the same thing, 1942, and ask you whether or not you recognize that slip and the signature of one of your employees. A. That's the same clerk that received the previous shipment.

—347—

Q. And does the paper attached thereto indicate the merchandise mentioned on the slip itself corresponds in number and price with the bill? A. That's right, it does, yes.

Q. And what is the slip attached thereto dated? A. January the 7th on the receipt and January the 11th on the top carbon copy of the bill.

Q. And the carbon copy of bill purports to be a bill for the merchandise mentioned in the receipt? A. That's right.

Q. Both of those slips indicate delivery to the Brooklyn Navy Yard, at the Brooklyn Navy Yard to the canteen thereof? A. That's right.

Q. Now I show you a slip dated January 22, '43, and ask you if you recognize that. A. It is the same clerk; yes, I do.

Q. And is that a receipt, sir, signed by your employee in the canteen at the Brooklyn Navy Yard? A. That's right.

Q. Now do your records reveal a bill from the Sero Syrup for the merchandise mentioned therein? A. Yes, they do, but I don't have those bills.

Q. Yes, but your records reveal that such amount was billed. A. That's right; surely.

Q. And paid for. A. That's right.

Q. Now I show you one dated January 15, 1943, and ask you whether or not you recognize the signature of your employee. A. I do.

—348—

Q. And is that the syrup delivered to the canteen in the Brooklyn Navy Yard? A. That's right, it is.

Q. And does the bill correspond in amount and numbers to that? A. It does.

Q. And does your record reveal a bill for that? A. Yes, sir.

Q. Now do these papers indicate the amount of syrup delivered to the canteen in the Brooklyn Navy Yard during the month of January? Do they—by Sero Syrup? A. They do; they do.

Q. Can you total it for us, please? A. 352 gallons.

—349—

Mr. Barshay: I offer that in evidence, your Honor, as one exhibit.

The Court: All right.

Mr. Hull: Which one are you offering?

Mr. Barshay: The January one.

Mr. Hull: May I inquire as to the purpose of this?

Mr. Barshay: Yes—your Honor, may I answer? To show that we delivered at the Brooklyn Navy Yard to this canteen in the Brooklyn Navy Yard this amount of merchandise pursuant to the letter and in explanation thereof.

Mr. Hull: In January?

Mr. Barshay: 1943.

Mr. Hull: I would like to ask him a question about it before it is introduced.

The Court: All right.

Cross-Examination (as to exhibit) by Mr. Hull:

Q. Is there any imitation vanilla syrup listed in any of those records? A. No, it is all regular syrup, flavored syrup.

Q. What do you mean by that? A. Cherry syrup or grape or root beer or something to the same effect.

Q. Not a single drop of vanilla syrup? A. No, sir.

Mr. Hull: I haven't any objection to it.

(Received and marked Exhibit D-11.)

—350—

Direct Examination by Mr. Barshay (Resumed):

Q. Now, for the month of February, may I ask you to look at one, two, three slips and tell me, please, if those are delivery slips signed by the same employee or another one of your employees at the canteen in the Brooklyn Navy Yard. A. That's right, they are.

Q. And your concern received it there and paid for it from the Sero Syrup Company? A. That's right.

Q. And the total of that, please? A. 278 gallons.

Mr. Barshay: I offer that in evidence, your Honor, for the same purpose, for the month of February, 1943.

Cross-Examination (as to exhibit) by Mr. Hull:

Q. Any imitation vanilla syrup listed in that? A. No, there is not.

Q. What kind of product is it? A. Grape, cherry, grape, root beer, grape, root beer.

Q. Is that the total of your sales and deliveries to the canteen or the concession at the Brooklyn Navy Yard? A. So far as Sero Syrup is concerned, yes.

Mr. Hull: No objection.

(Received and marked Exhibit D-12.)

Louis Brock—for Defendant—Direct

Direct Examination by Mr. Barshay (Resumed):

Q. Mr. Brock, did your concern permit the defendant Sealfon to post his signs in the machine containing the name Sero Syrup and whatever name of syrup, whether it is

lemon, grape, or whatever it is—did you? A. That's right.

Q. I show you one of them and ask you whether that is one similar to that or for grape or other colas or other syrups mentioned. A. That's right, that is the sign we used.

Q. And he is permitted to put that in the machine itself? A. That's right.

Mr. Barshay: I offer it in evidence, your Honor.

Mr. Hull: No objection.

(Received and marked Exhibit D-13.)

Q. Now in addition, sir, to the syrups, whatever the flavor is, that were purchased from your concern by Mr. Sealfon for delivery directly to the canteen in the Navy Yard, did Mr. Sealfon and the Sero Syrup sell you other syrups? A. That's right, he did.

Q. Those he delivered directly to your warehouse in New York? A. That's right.

Q. And I take it that those you used in the regular course of business? A. That's right.

Q. But you haven't any record, have you, to show how much of that, if any, was to the canteen in the Brooklyn Navy Yard? A. No.

Q. There is no possible way to do that? A. No.

Q. That was the means adopted by you to replenish, if any was needed, in the various places and in the canteen at the Navy Yard? A. That's right.

—352—

Q. But you never kept records to show how that was done? A. No.

Mr. Barshay: Thank you.

Cross-Examination by Mr. Hull:

Q. What is the business name of your concern? A. New York Automatic Canteen Company.

Q. Located at what address? A. 314 East 23d Street, New York City.

Q. Did it operate at 304 East 23d Street, New York City, in 1942? A. Yes, it did.

Q. Does it still operate at those numbers together? A. No.

Q. Please explain that. A. That is the next building. We moved from one building to another.

Q. But it was the same company? A. That's right.

Q. Did you use the name The Canteen in conducting your business? A. Well, we used that as a trade name only but the exact name is New York Canteen Company.

Q. On your letterheads in 1942 bearing the address 304

East 23d Street, New York City, did you use the name The Canteen? A. I would not know offhand.

Q. But the same company that you are talking about now operated at 304 East 23d Street, New York City in 1942. Who is Mr. John T. Collins? A. He is president of the New York Automatic Canteen Company.

—353—

Q. Is he still? A. Yes.

Q. And he was then? A. Yes, sir.

Mr. Hull: Your Honor, I would like to reserve further cross-examination of this witness until sometime later in the trial.

The Court: Why?

Mr. Hull: I cannot tell at this point.

The Court: Well, come up to the side bar.

Mr. Hull: I mean I cannot tell at this point what I might want to ask him but I think I will want to question him further.

Mr. Barshay: I have no objection.

The Court: Well you have not a very good reason for it. All right. You may step down.

Mr. Hull: Please remain in the courtroom.

ROBERT SEALFON, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Mr. Sealfon, you are the defendant in this case? A. Yes, sir.

Q. You do business as the Sero Syrup Company? A. I do.

Q. And for how long have you done business under that name? A. Approximately ten years, sir.

Q. Originally were you the sole owner? A. No, sir.

Q. You had a partner? A. I did.

—354—

Q. And the name Sero Syrup was a combination of your first two letters and your partner's first two letters, isn't that so? A. That is correct.

Q. Where did you operate, sir? A. 578 Manhattan Avenue, Brooklyn.

Q. From when? A. I would say for the last four or five years.

Q. And before that? A. 50 North 11th Street, Brooklyn.

Q. Since Nineteen hundred and what? A. About ten years ago, 1936.

Q. Where were you born, Mr. Sealfon? A. Tyrone.

Q. How long ago? A. 37 years ago.

Q. Where were you educated? A. Altoona, Pennsylvania.

Q. Did you go beyond high school? A. No, sir.

Q. When for the first time did you come to New York? A. About twelve years ago.

Q. Are you married, sir? A. Yes, sir.

Q. Children? A. Yes, sir.

Q. Have you ever been in trouble in your life? A. No, sir.

Q. Prior to 1943, did you ever have any business at all with the Fresh Grown Preserve Company? A. No.

Q. Did you know them at all? A. No.

Q. Did you ever have any business prior to that or at any time with Kraemer and Company, a sugar brokerage concern? A. No.

—355—

Q. Did you have a friend by the name of Sanford Doctors? A. Yes.

Q. Was it a social friend or business friend? A. Both.

Q. Before January, 1943, did you ever have any business with him of any kind? A. No, except he used to come to my office once in a while.

Q. But no business relationship? A. No.

Q. Who is your broker? A. B. W. Dyer & Company, 120 Wall Street, New York City.

Q. Now, did there come a time when Mr. Sanford Doctors had some talk with you concerning the sale of imitation vanilla flavored syrup? A. Yes, sir.

Q. Can you tell us the approximate date? A. In the early part of 1943.

Q. What month? A. January.

Q. And where was the talk? A. In my office.

Q. What was it? A. He came over to see me. He told me that he—he asked me, rather, if I was interested in buying some flavored syrup and I said yes. He said he knew someone, a very big company and he thought he could get me some syrup from them if I were interested. I said "of course I am, find out what you can get it for and let me know."

Q. Did he let you know? A. Yes, sir.

Q. When? A. I would say several days later.

—356—

Q. Did he give you the name of the concern? A. Yes, sir.

Q. Was it the Fresh Grown Preserve Corporation? A. Yes, sir.

Q. Did he tell you his address? A. Just Lyndhurst, New Jersey, that's all.

Q. And did you and he talk in this conversation about price? A. Yes, we did.

Q. What was the price agreed? A. The original price agreed upon was 65 cents per gallon, f.o.b. the Lyndhurst plant and we to furnish or supply them with the barrels or containers and to ship at their end.

Q. And when for the first time did you obtain your first shipment? A. January 15, 1943.

Q. When for the first time in your life did you meet Mr. Murray Greenberg? A. That day.

Q. Where? A. At his office in Lyndhurst.

Q. Who was present? A. No one.

Q. Was Doctors present at all? A. No, sir.

Q. Did you have a talk with Mr. Greenberg? A. Very little talk, just I came into the office and I said, "I am from Sero Syrup." He says, "Yes, Mr. Doctors spoke about you."

Q. What did you have with you? A. Pardon me?

Q. What did you have with you, any money, checks, or what? A. Two certified checks with me.

—357—

Q. To whose order were they made? A. They were made out to my order.

Q. And what did you do with them? A. After I saw the

plant I walked back to the office and brought both checks over to the Fresh Grown Preserve and gave them to them.

Q. Both of them? A. Yes, sir.

Q. Who was the truckman you used that day? A. I had hired Seidenberg of Brooklyn.

Q. Did they take out the merchandise? A. Yes, sir.

Q. And you gave both of those checks to Mr. Greenberg? A. Yes, sir.

Q. Referring to Government's Exhibit 7 I show you these two checks and ask you whether or not these are the checks of your company. A. They are.

Q. Looking on the other side, did you endorse them? A. Yes, I did, in my handwriting.

Q. And did you get the receipt attached thereto signed by Mr. Greenberg? A. Yes.

Q. Had you ever been to that plant before that day? A. No, sir.

Q. Describe the plant as you saw it for the first time. A. Well, it was a very large plant, tremendous amount of activity. When I walked into the plant there was sugar coming in, barrels of sugar being filled; in fact I would say there was at least 100 barrels of sugar upon the floor

at the time. The plant was just humming with activity at that time; I was very much impressed with it.

Q. Compared, sir, to your own plant, was this very large? A. Yes, tremendous.

Q. Now, that load of syrup was taken where? A. To my plant in Brooklyn.

Q. And then did you sell it? A. Yes, sir.

Q. Had you before that time dealt with the National Biscuit Company at all? A. No, sir.

Q. Did you talk to Mr. Greenberg about the purchase of more syrup? A. Yes, I did.

Q. When did you do that? A. I think the same day.

Q. What did he say and what did you say, to the best of your recollection? A. Well, he said, "as soon as you are ready I can give you some more if you want some more."

Q. Keeping that in mind did you communicate with your broker, B. W. Dyer? A. I did.

Q. And as a result of that did you obtain the National Biscuit Company as your customer? A. I did.

Q. Had you known Mr. Citron before January, 1943? A. No, I did not.

Q. Had you known Mr. Kranski before January, 1943? A. No, sir.

The Court: When did you first secure the National Biscuit Company as your client?

—359—

The Witness: Between the first load and the second shipment.

The Court: When was that?

The Witness: Between January 15 and the middle of February.

Q. Was the first shipment in February, and the first shipment since January 15, on the 17th of February, 1943? A. Yes, sir.

Q. Was that the first time that Mr. Citron of Citron and Kranski acted as your truckman? A. Yes.

Q. Were they introduced to you by anyone? A. They were.

Q. Had you ever had them cart a single item for you before that? A. No, sir.

Q. Now, in the meantime and on February 17, 1943, did you make out a certified check to the order of the Fresh Grown Preserve Company for $2750 for another load of syrup? A. Yes, sir.

Q. And who carted that? A. Citron and Kranski.

Q. To where did he cart it? A. National Biscuit Company, New York City.

Q. Directly? A. Yes, sir.

Q. And did he bring you anything from them? A. Yes, sir, he brought me a receipt from them.

Q. What was the price of the second load per barrel? A. 70 cents per gallon.

—360—

Q. Per gallon, rather. In other words, there was an increase from 65 to 70? A. That is correct.

Q. Did you pay that by certified check? A. Yes, sir.

Q. Did you sign each check? A. I did.

Q. Did you draw it on your regular account? A. Yes.

Q. Was the first entry made in your book? A. Yes.

Q. Was the second entry made in your book? A. Yes.

Q. Was every entry made in your book of syrups purchased from Fresh Grown by you? A. Yes.

Q. And sold by you to the National Biscuit Company? A. Yes, sir.

Q. And billed by you to the National Biscuit Company? A. Yes.

Q. Now in addition to the National Biscuit Company did you have some other customers? A. I did.

Q. And give their names, some of them. A. Well, the American Tobacco Company, Loft Candy Corporation, a few other small ones.

Q. And were they duly entered in your regularly kept books? A. All my business was entered in the books.

Q. I show you Government's Exhibit 7, Government's Exhibit 5 and Government's Exhibit 6 and ask you whether or not these checks in the main all certified were the checks of the Sero Syrup Company that you paid to the Fresh Grown Preserve Company for the bills attached thereto. A. Yes,

—361—

these are all my checks.

Q. What is the last date of that check? A. The last check here?

Q. Yes. A. May 15, 1943.

Q. Yes. A. May 15, 1943.

Q. How did you pay Citron for the cartage? A. By check.

Q. Every time? A. At the beginning, no, sir.

Q. No? Citron, for the cartage? A. We paid him by check.

Q. Well I asked you every time? A. Yes, of course, every time.

Q. That is what I asked you. Was it entered in your book? A. Yes.

Q. Did you have anything to do at all with the keeping of Citron's books? A. No, sir.

Q. Did you give him any instructions of any kind whatever? A. No, sir.

Q. Now after February 17, 1943, you testified you obtained, or around that time, the National Biscuit Company as a customer. A. Yes, sir.

Q. Did you have any other talk with Mr. Doctors concerning the transactions you were having with Mr. Greenberg and the Fresh Grown? A. I did.

Q. Who originated the talk? A. Mr. Doctors.

Q. What was it? A. He came over to my office again in the latter part of February, 1943, and he told me that Mr.

—362—

Greenberg had asked him to get a letter from me stating where I sold my merchandise, and I actually laughed at him. I said, "I am not going to tell you or anybody where I am selling my merchandise." I said, "What does he want the letter for?" He says, "I don't know." Well, that ended the conversation. I said, " I will see about it."

Q. Incidentally did you agree with Mr. Doctors on payment by you to him for bringing about the sale? A. I did.

Q. Did you pay him? A. I did.

Q. Did you ever pay him in any other manner than by check? A. No, sir.

Q. I show you these checks and ask you, referring to Government's Exhibit 3 in evidence, whether these are the checks made out by you and given either to Doctors or his wife for all the commission or payment made by you to him for bringing about this deal. A. Yes, sir.

Q. Did Kraemer and Company bring about this deal for you or did Doctors personally? A. Doctors personally.

The Court: Did you know that Doctors worked for the Kraemer Company?

The Witness: Yes, sir, I did.

The Court: And you knew that they were brokers?

The Witness: Yes, sir.

Q. Did Kraemer and Company ever make a demand upon you for commissions to this very date? A. No, sir.

—363—

Q. Do you know what a finder's fee is? A. I do.

Q. Will you explain it to the Court? A. When material is hard to get, scarce, such as in an emergency, syrups or anything else, it is customary in the trade to pay what is known as a finder's commission to the person consummating a deal.

The Court: When did you first pay a finder's fee?

The Witness: To Doctors.

The Court: That is the first time you ever paid it?

The Witness: Yes, sir.

The Court: Did you pay any since then?

The Witness: No, sir.

Q. Since then, Mr. Sealfon, your business has been almost or the largest degree with the Fresh Grown Preserve, has it not? A. That is correct.

Q. Did you know whether or not that practice existed in the trade, from your experience in the trade? A. Yes, sir, I have been told it was done and still is being done.

The Court: Do you know of your own knowledge?

The Witness: Yes, I have been told that, sir.

The Court: No, do you know of it of your own knowledge? Do you know of any payments that were made outside of what you were told?

The Witness: I have been told by people making

—364—

those kind of payments.

The Court: And when did that practice originate?

The Witness: Quite a number of years ago.

The Court: Two years ago?

The Witness: No, more than that.

The Court: How long has it been the established practice in your business, if it has been?

The Witness: Well, I would say at least since the war started with the rationing of sugar products.

The Court: With the rationing of sugar?

The Witness: At least since that.

The Court: Not before that?

The Witness: I don't know, sir.

The Court: You don't know whether it was a practice before the war or not?

The Witness: It was the practice in other industries.

The Court: No, in your industry.

The Witness: No, in our industry I don't know.

Q. Because of the scarcity of merchandise it was customary as you say for the purchaser to pay a commission and for the seller to pay a commission? A. That is correct.

Q. Now at any time, I ask you again, until this very minute, did Kraemer and Company ever make a demand upon you for any commissions at all? A. No.

—365—

Q. Did you ever have any business with Kraemer himself? A. No, I did not.

Q. Now there came a time, did there not, when you received a letter from Mr. Doctors to the effect that he was an independent broker? A. Yes, sir.

Q. Can you tell us what brought that about? A. At that time there was a 20 per cent withholding tax I think had gone into effect, or was already in effect and my accountant drew my attention to the fact that we should deduct that from Doctors' commission check.

Q. Did you relate that to Mr. Doctors? A. I did. He says he is acting as an independent broker and will send me a letter to that effect which he did.

Q. Do your books reveal the payment of every cent to Mr. Doctors? A. Yes, sir.

Q. Now there was a time when Doctors went into the Army, wasn't there? A. Yes.

Q. And there was a time when he went overseas as a soldier? A. That's right.

Q. During those times did you continue from month to month to send unto Doctors' wife a monthly check? A. I did.

Q. And what was it for? A. For the syrup that was purchased from Fresh Grown Preserve Corporation.

Q. Now subsequent to the talk with Doctors about this letter did you have occasion to speak to Mr. Greenberg?

A. I did.

Q. Where was that? A. At his plant in Lyndhurst, New Jersey.

Q What part of the plant? A. It was in the warehouse part of the plant.

Q. Who was there? A. Mr. Murray Greenberg.

Q. Anyone else? A. No, sir.

Q. What was the conversation? A. When I come into the plant Mr. Greenberg said to me, he says, "Did Doctors talk to you about a letter?" I says, "Yes, Mr. Greenberg, what is it all about?" "Well," he said, "where are you selling your merchandise," and I actually smiled; I said, "I am not going to tell you where I am selling my goods. What do you want to know for?" He says, "Well, how do I know you are not selling it to bootleggers?" "Well," I said, "I am not." He said, "Are you selling any Government agencies?" I said, "No; why?" He said, "Well, if you are I can get the sugar back for that." I said, "Well, if I am selling the Government agencies I don't need you to get the sugar back; I am a manufacturer, I can get it back myself." "Well," he says, "Are you selling any Government plants?" I said "Not any Government plants, but I am selling some defense plants." "Well," he said, "Write me a letter to that effect." I said, "What for?" "Well," he said, "It is our custom," and I didn't think anything of it and he walked away from

—367—

me, walked into the manufacturing part of the plant and I walked back in the office to make a 'phone call.

Q. Before you go any farther, Mr. Sealfon, may I ask you, was there any talk about the Brooklyn Navy Yard? A. No.

Q. In that same conversation? A. No, sir.

Q. When he spoke about defense plants did you give him the names at that time, in the oral conversation? A. No, sir.

—368—

Q. Now did you explain to him how you happened to sell at the defense plants? A. No, sir.

Q. Was there any talk at all about the manner of delivery of merchandise or syrups of any nature? A. None.

Q. At the Brooklyn Navy Yard? A. None.

Q. Did you tell him that you would give him a letter in effect suggesting that by inference you would say in the letter that you were selling to the Brooklyn Navy Yard? A. I did not.

Q. And that that letter was to be used for the purpose of getting replacement certificates at the ration board? A. No, sir.

Q. Did you convey any such idea to him at all? A. Never.

Q. Was it the subject of conversation? A. Never.

Q. Did you ask him the routine that he would follow? A. I had no idea what he might do.

Q. Did you ask him that? A. I didn't ask him.

Q. Did you know it? A. No, sir.

Q. Did you approve it? A. I did not.

Q. Did you consent to it? A. No, sir.

Q. Did you give him any letter for any such purpose as to defraud the ration board or the Government of the United States? A. I did not.

Q. After the conversation on the outside, what did you do, you say? A. I went into the office and I made a phone

—369—

call and I sat down at one of the desks there and I took a piece of paper and I was thinking, well, he wants a letter where I am selling my goods.

Q. What did you write? Not what you thought. What did you write? A. I wrote —

Mr. Hull: We are willing to hear what he thought as well.

Mr. Barshay: All right. If you have no objection, sir.

Q. Go ahead.

Mr. Hull: No objection to anything.

A. All right. It was running through my mind at that time that he wanted a letter where I am selling my merchandise and I certainly wasn't going to reveal any outlets to him or to anyone, and having in mind the canteen account which was delivering syrups either by myself or through their own trucks, my syrups, to the various defense plants and to the Brooklyn Navy Yard, I sat down at the desk there and I wrote a letter by longhand and I walked out to the plant and I said to Mr. Greenberg, "Here is a letter, Mr. Greenberg."

He took a look at it and he said, "All right, type it on your stationery and mail it to me."

And I walked away from him.

Q. Have you an idea what date that was? A. It was March the 3rd.

—370—

Q. 1943? A. Yes, sir.

Q. Did you plan with him what should be written in that letter? A. Never.

Q. Did he aid you in its formulation? A. He never said one word to me.

Q. Did he have anything to do with its writing at all? A. No, sir.

Q. Or its construction? A. No, sir.

Q. Or its language? A. No, sir.

Q. Or what you shall put in it? A. No, sir.

Q. Was it ever discussed by you and him at all in any shape, manner or form? A. Never.

Q. Now was there any other conversation you had with Greenberg that day with respect to another subject? A. Yes, sir.

Q. What was it? A. At that time I could get a fairly good contract from the National Biscuit Company and I had in mind trying to get a contract from Mr. Greenberg for syrups and I spoke to him about that subject also.

Q. What did he say? A. He said, "Well," he says, "I will talk to you about it in a few days."

Q. Now did you want to reveal to him, or did you ever reveal to him, that the merchandise purchased from him was going to the National Biscuit Company? A. He never knew where it went to.

—371—

Q. Did you ever tell him? A. No, sir.

Q. Did you want him to know? A. No, sir.

Q. That was a large account, wasn't it? A. Yes, sir.

Q. And he was in a position to undersell you, wasn't he? A. Well, I thought that if he knew where my merchandise was going he may go there himself and sell it.

Q. With respect—

The Court: Wasn't the National Biscuit Company on the market for anybody?

The Witness: Yes, but not everybody knew that, your Honor.

The Court: At the time of the sugar shortage—

The Witness: Yes, sir.

The Court: —was the National Biscuit Company making—

The Witness: Yes, sir; yes, sir.

Q. The National Biscuit had its own brokers, had it not? A. Yes.

Q. And had its own people who had been doing large business with it. A. Yes, sir.

Q. Did Mr. Greenberg ever tell you his quota? A. He never did.

Q. Did you ask him his quota? A. I never did.

Q. Now, did you notice anything with respect to the firm name itself of the Greenberg concern, Fresh Grown Pre-

—372—

serve Company? A. Yes, sir, I did.

Q. What did that indicate to you? A. Well, it indicated to me that they were jam and jelly manufacturers.

Q. And—? A. And I asked Mr. Greenberg one day how you can make syrups when you are manufacturing jams and jellies. He said he got permission from the ration board to convert, and I also know that had been the fairly common practice; when certain materials were scarce, as in this case, fruit was scarce, they would get permission from the ration board to convert and make other items—in this case they made syrups.

The Court: Well, do you know of your own knowledge which was scarcer, fruits or syrups, at the time?

The Witness: Fruits were scarcer, sir, because sugar was rationed and you would get a definite allotment, but the fruits depended on the season and on the crop and labor and so on—so fruit would fluctuate, just—

The Court: Do you know that?

The Witness: Yes. At the present time fruits are practically unobtainable altogether—right at the present time now.

The Court: Are they?

The Witness: Yes, sir.

Q. Now, Mr. Sealfon, was there an appointment made with respect to the drawing of the contract? A. Yes, sir.

Q. Where was the appointment made? A. Kraemer & Company's office.

—373—

Q. Were the terms of the contract there discussed? A. They were.

Q. Was an appointment made for its execution at the office of the attorneys for Mr. Greenberg? A. It was.

Q. Did you go to the office of the attorney for Mr. Greenberg? A. Yes, sir.

Q. And the name of the attorney? A. I believe it was Getz & Midler.

Q. What address? A. It was on lower Broadway, around 66, or something like that.

Q. And at that time did you have an attorney with you? A. I did.

Q. After the contract was drawn did you take it with you? A. Yes, sir.

Q. You didn't sign it that day, did you? A. No, sir.

Q. Did you make some changes in that contract subsequent to your taking it from the office of those attorneys? A. Yes, sir.

Q. On March 10th, 1943, did you sign this contract? A. Yes, sir.

Q. Is this your signature? A. Yes, sir.

Q. And do you know the signature of Leo Greenberg, the vice president? A. Yes, sir.

Q. Is that his signature? A. Yes, sir.

—374—

Q. And did you initial the changes made in the contract at your office? A. Yes, sir.

Q. And did you in a letter ask the Greenbergs to initial the same changes? A. I did.

Q. And did you mail a signed copy— Withdrawn. Did you mail two copies of this contract signed by you with the Greenbergs? A. I did.

Q. And request that one of them be sent back to you? A. Yes, sir.

Q. And is this the contract that was sent back to you? A. Yes, sir.

Q. It contains the initials of you, one of the Greenbergs, and your signature and that of the Greenbergs? A. Yes, sir.

Mr. Barshay: I offer it in evidence, your Honor.

Mr. Hull: May I see it?

I have not the slightest objection.

(Received and marked Exhibit D-14.)

The Court: I think we will recess now for five minutes.

(At this point a short recess was taken.)

Q. Did you ever speak to Mr. Greenberg about getting a rebate of two cents a pound or a cheaper price? A. No, sir.

Q. Did you ever get any money from him at all? A. No, sir.

Q. In Longchamps or any other restaurant or in any automobile, did you ever get from him one half a million

dollars or any amount of money? A. No, sir.

Q. Did you ever ask for a rebate? Did you? A. No.

Q. Did you ever say to him in words or in substance, "For the idea that I am giving you, I want a rebate in the form of two cents, and I want it in cash"? A. No.

Q. Now you were in Pappas one time, were you not? A. Yes, sir.

Q. Where is Pappas? A. 14th Street, and I believe the corner of 7th Avenue, in New York City.

Q. Is that a bar and grill or restaurant?

The Court: 14th and 7th or 14th and 8th?

The Witness: 14th and 7th, as I recall; I am not sure.

The Court: Near the subway?

The Witness: That's right. I believe it is 8th Avenue; you are correct, sir, the corner of 8th Avenue.

Q. Is that a bar and grill? A. That's a restaurant with a bar and grill on the side of it.

Q. How many times were you there? A. Once.

Q. What was the occasion and when, if you can recollect? A. Well, the exact time I couldn't place, but I know we were having some trouble with the Baume several times, from National Biscuit complaining, and I called Mr. Greenberg and I wanted particularly to have Mr. Citron there,

and it was convenient to him because he was delivering the

—376—

syrup to the National Biscuit Company, and that's why I picked the location.

Q. Well, how far is the National Biscuit Company from Pappas? A. It is on 14th Street; it is about a block and a half.

Q. Is that the reason? A. Yes, sir.

Q. And did you have a talk with Mr. Greenberg about the complaints? A. Yes, sir.

Q. Of your customers? A. Yes, sir.

Q. Was the name mentioned? A. The customer's? A. No, sir; just that I said our syrup is not being delivered properly; we weren't getting the right Baume. I never told him where it was being delivered to.

Q. Did you get any money from him there? A. No, sir.

Q. Were you ever in his automobile? A. I was never in his automobile.

Q. Was he ever in your automobile? A. No, sir.

Q. Did you ever see any invoice prepared by the Greenbergs for the purpose of filing with the ration board? A. Only after the investigation started.

Q. When the OPA officials or investigators showed them to you? A. Yes, sir.

Q. Before that had you seen them? A. No, sir.

Q. Had you had anything to do with its preparation? A. No, sir.

Q. Or did you know that they were being prepared? A. No.

—377—

Q. Did you ever talk to him about getting two cents per pound for every pound of sugar he got from the ration board? A. No.

Q. Did you know how many he got? A. No, sir, I never had any idea.

Q. Did you ever discuss it with him? A. No, sir.

Q. Did you ever visit the board? A. No, sir.

Q. Do you know where it is? A. Just that I think it is at Lyndhurst.

Q. Do you know where it is? A. No, sir.

Q. The specific place. A. No, sir.

Q. Did you ever communicate with it? A. No, sir.

Q. Did you ever go with the Greenbergs to that board? A. No, sir.

Q. Did you ever have anything to do with the drawing of the application by Greenberg filed at the ration board? A. None.

Q. Did you know he was going to do it? A. I did not.

Q. Or how or when he was going to do it? A. I never knew anything.

Q. Did you ever consent to or approve the method of doing that? A. No, sir.

Q. Did you intend in any wise whatever to aid or assist the Greenbergs to defraud the ration board at Lyndhurst or any other place? A. No.

—378—

Q. Did you know how much he sold to the Royal Crown? A. I did not.

Q. Or to the Baron Corporation? A. No, sir.

Q. Or to any one of them? A. No, sir.

Q. Now there was a time, was there not, that you obtained the services of the McCormack Transportation Company? A. Yes, sir.

Q. Is that a large concern? A. Yes, sir.

Q. Did you pay them by check? A. Yes, sir.

Q. Was that entered upon your books? A. Yes, sir.

Q. Did you pay Citron in addition for trucking any other moneys? A. I did.

Q. For what? A. For supervision.

Q. And was that entered on your books? A. Yes, sir.

Q. Was that all in the same check? A. Yes, sir.

Q. Did you ever tell Mr. Greenberg—did you ever tell Mr. Citron to give the duplicate purchase orders to Mr. Greenberg? A. I never discussed the purchase orders with him.

Q. Do you know whether he gave it or didn't? A. I never knew.

Q. Now you never got invoices from Greenberg, did you, after the payments started? A. No, sir.

Q. You never got receipts, did you? A. Not from Greenberg.

—379—

Q. Now who was the first one, sir, who suggested the payment of cash? A. Mr. Citron, the truckman.

Q. What did he tell you? A. He said Mr. Greenberg wants cash from now on instead of checks.

Q. What did you arrange? A. I arranged to give him the cash.

Q. How did you arrange it? A. I made the checks out to the order of Frank Citron and he signed my original

purchase order for the checks, and he took the checks to his bank or my bank, we both happened to deal in the same bank, and cashed the checks and took the cash to Greenberg.

Q. Did you pay to Mr. Greenberg in that fashion almost a million and a quarter dollars? A. I think that's what my books reflect. It was about a million and a quarter.

Q. And every sale reflects itself in your books? A. Yes, sir; every sale is on my book.

Q. Now did you have an arrangement, sir, with the Automatic Canteen? A. Yes, sir.

Q. For how long? A. It started, I believe, the early part of 1942.

Q. And what was your arrangement with them? A. They were selling them syrups and we either made deliveries to their warehouses or direct to the plants where the syrup was being used.

Q. Was the canteen in the Brooklyn Navy Yard one of

them? A. Yes, sir.

Q. And were there other defense plants? A. Yes, sir.

Q. Now you didn't sell one bit of the syrup of the Fresh Grown which you purchased from them to the Brooklyn Navy Yard to any exempt agency, did you? A. I did not.

Q. And the syrup, the cherry or lemon or lime, whatever it is that you sold to the canteen was not Greenberg's syrup at all, was it? A. No, sir.

Q. That had nothing to do with Greenberg's syrup? A. No, sir.

Q. That stuff always went to the extent of 98 percent to the National Biscuit, is that right? A. Approximately.

Q. Now you knew, sir, that if you sold any merchandise to any exempt agency, being a manufacturer you were entitled to receive replacement certificates therefor, isn't that so? A. Yes, sir.

Q. Now, what routine—

The Court: Provided you manufactured it yourself.

The Witness: Yes, sir.

Q. What routir did you have to follow when you did that? A. There were several methods. The most we followed through was we would ship to a jobber, in this case it was the canteen also, and they would reship it to what was called a so-called exempt agency, either to a ship's stores or to the Sheepshead Bay Training Station at

Brighton Beach, and the officer there in charge or somebody there in charge would sign for it, and when we were ready to get the replacement of the sugar back, we would write to the canteen or the people that we were shipping to a letter, stating the amount of syrups we had shipped them for that particular spot, and also certified on our letter the exact amount of sugar we used in the manufacture of that syrup and they in turn took that letter to the people it was delivered to, that is the people the syrup was delivered to, and they either issued the certificates and sent them to us or issued them and gave them to the canteen who in turn sent them to us—that is, to Sero Syrup Company—as the manufacturer.

Q. Now when did you typewrite this letter of March 3rd, referring to Government's Exhibit G-4? A. Well, I would say when I went back to my office, after March the 3rd. I presume it would be about the early part of March, the 5th or 6th, in through there somewhere.

Q. Did you copy it exactly as you wrote it then? A. I did, sir.

Q. What did you do with it? A. I left it on my desk.

Q. And when did you see the Greenbergs again? A. Oh, it was quite a while before I saw him again after that, as I recall it.

Q. Well, wasn't it in respect to the contract? A. Yes. I mean we did have that meeting, that's right.

—382—

Q. Now was there a conversation at that time with Greenberg about the letter? A. No.

Q. Well, how did you come to mail this letter to him? A. He just asked me after we had met that day, "How about the letter?"

I says, "That's all right; I will send it to you."

Q. And when did you send it to him? A. When I sent him back the contract and the letter telling about the changes in the contract, I also sent the letter back of March the 3rd.

Q. And was that with the letter of March 10th, 1943? A. Yes, sir.

Q. Referring to Government's exhibit in evidence No. 4, is that correct? A. I don't know what exhibit it is in; the letter of March 10th.

Q. Well, you sent the letter of March the 10th and en-

closed therein the contract which is now in evidence and the letter of March 3rd. A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Did you change it in any way from the original letter which you wrote out? A. I did not.

Q. Did Greenberg have anything to do with the wording, punctuation, or the contents of this letter? A. No, sir.

Q. Now when you mailed it out, sir, did you intend that it be used for the purpose of defrauding the Government in any manner whatever? A. Definitely not.

—383—

Q. Did you know it was going to be? A. No, sir.

Q. Did you see Mr. Greenberg at Longchamps? A. I did, sir.

Q. When? A. It was after the investigation had started.

Q. How many times all together did you see him at Longchamps? A. Once.

Q. Did you ever receive any money from him at that time? A. No, sir.

Q. What was the occasion of your meeting Mr. Greenberg at Longchamps? A. Well, he had phoned my office and told me he wanted to see me and I said I was going to be in New York that day and would be glad to meet him, and I asked him to meet me in front of Longchamps restaurant, because my accountants happen to be near that building, and I occasionally eat there; and he did meet me in front of Longchamps at one o'clock, at the time I usually have lunch.

Q. Was it at one o'clock? A. Yes, sir.

Q. Now did you go in and have lunch with him? A. Yes, sir.

Q. Anybody else there? A. No, sir.
Q. What was the conversation? A. He said—

Mr. Hull: May we have the time fixed?
Mr. Barshay: After the investigation began.

Q. Do you know the month, sir? A. It was after the investigation. I would say it was towards the end of 1944.

—384—

Q. Go ahead.

Mr. Hull: Could we have a month on that?
The Court: Do you remember the month?
The Witness: I couldn't remember, your honor.
The Court: All right.

Q. Well, it was before September 1944, wasn't it? I am trying to fix your date. A. It was towards the end of 1944.

Q. Wait a minute. Let me try to fix your recollection, if I can. The arraignment was sometime in September, wasn't it?

Mr. Barshay: Wasn't it, Mr. Hull, 1944?
Mr. Hull: No, it was in 1945.
Mr. Barshay: I beg your pardon; I beg your pardon. It is my mistake.

Q. It was before you were brought to court.

The Court: Well, to the best of your recollection it was toward the end of 1944?

The Witness: Towards the end of 1944, that's right, because I know we had already had an investigation at that time; that's why I knew it was toward the end of '44.

Q. In other words, Government agents had already been at your office. A. Yes, sir.

Q. That's how you know about it. A. That's correct.

Q. Now what did Greenberg ask you? A. He said, "Sealfon," he said, "I am being investigated now by the OPA."

—385—

I said, "I know about it. They have already been to me, too."

He says, "Well, if they ask you how much syrup you got from me, will you tell them about four or five million gallons?"

I said, "What? Are you crazy?" I says, "All I can tell them is what's in my books."

Well, he didn't say much about it and we finished our lunch and he went out.

Q. Was there any talk of money at all? A. No, sir.

Q. Now did there come a time when Citron during this matter called to your attention the fact that one of the Greenbergs asked of him to sign more than one receipt? A. Yes, sir.

Q. What did you tell Mr. Citron to do? A. At that time I told him not ever to sign more than one receipt for a load of merchandise unless there was a carbon paper between the two receipts and if there were never a carbon paper I instructed him to be sure and mark the second

copy "duplicate" and the third copy, if there were one, "triplicate."

Q. That was before you started your system of paying in cash, isn't that so? A. Yes, sir.

Q. Now there came another time when you saw Greenberg during this investigation, isn't that so? A. That's correct.

Q. Where was that and when, if you can tell us? A. Well, it was after that meeting I just was talking about at Longchamps Restaurant. He—

—386—

Q. Where? A. He called me and told me he wanted to meet me again and I said I was going to be in New York, I would be glad to meet him and I said, "Where do you want to meet me?"

"Well," he said, "anywhere you say."

I told him to meet me at the office of my accountants because I had to be there that day, Rosen & Rosen, and—

Q. Did he meet you there? A. Yes. It was late in the afternoon at that time, as I recall it.

Q. You had your own business there, did you? A. Yes, sir.

Q. Now did you have occasion to talk to Greenberg in that office? A. I did, sir.

Q. Any particular part of the office? A. Well, we went into one of the private rooms there.

Q. What did Greenberg say to you?

Mr. Hull: Wait a minute. We haven't had a time fixed for this either.

The Court: Well, how long subsequent to the meeting at Longchamps?

The Witness: Oh, it was several months, your Honor.

The Court: That would be the early part of 1945?

The Witness: That was towards the end of '44, probably November or December of '44.

Q. Now you had the meeting at Longchamps toward the

end of '44? A. That's right.

The Court: Now when was this new meeting?

The Witness: Well, it was about a month or two later.

The Court: A month or two later?

The Witness: Yes, sir.

Mr. Hull: All right.

Q. As best you know, Mr. Sealfon. A. That's correct.

Q. That is the best date? A. That is right.

Q. Now what was the substance of that talk then? A. We went into one of the private offices there and he said, "Sealfon, I am in some trouble, and I think I can fix it up," and he says, "I have got you down for $25,000 contribution."

I says, "What do you mean?"

"Well," he said. "I want to take care of you."

I says, "You don't have me down for nothing." I says, "I am not in any trouble." I said, "I wouldn't give you a penny," and he got very angry.

Q. Did you give him any money? A. No, sir. He got very angry with me. He says, "Is that your answer?"

I said, "Yes," and he walked out of the office. His brother Leo was with him and he didn't even open his mouth and say one word during the entire conversation.

Q. I show you, Mr. Sealfon, the original checks of your concern commencing April 29, 1943 and the last one dated June 23, 1944, and ask you whether or not those are the

checks that you paid to the Fresh Grown Preserve Company through Citron. A. Do you want me to check every one, sir, or just—?

Q. Well, you have seen them before, haven't you? A. I have seen them, yes, sir. They are the checks.

The Court: These are the checks which you gave to Citron for Fresh Grown plus the cartage?

Mr. Barshay: Answer the Judge's question.

The Witness: Yes, sir, and some were made out to cash that I cashed myself in the beginning.

The Court: Wait a minute. Just answer the question.

The Witness: I am sorry, sir.

The Court: These checks represent sums which you directed to be paid to the Fresh Grown for the syrup plus the cartage?

The Witness: Yes, sir.

The Court: And the checks were made out to Citron to cash?

The Witness: That is correct.

Q. Well, the check to Citron, the first one dated, is June

1, 1943; I call your attention to that. Will you look at it, please? A. That is correct.

Q. Theretofore some of the checks were certified, is that correct? A. Yes, sir.

Q. And some of the checks were made out to cash? A. Yes, sir.

Q. And in any event you gave them to Citron, whether

—389—

they were certified or not, or whether they were made out to cash and cashed by Citron, or cashed by yourself. A. I cashed a few of the ones at the beginning, myself.

Q. Mr. Sealfon, are these checks, photostatic copies of which were presented to this Court on behalf of the Government— A. Yes, sir.

Q. And were they examined by Mr. Wedel at your office? A. Yes, sir, very minutely.

Mr. Barshay: I offer them in evidence, your Honor.

Mr. Hull: I would like to inquire whether the check stubs are available.

Mr. Barshay: Yes, yes, surely. I offer them in evidence.

The Court: All right, mark them.

(Received and marked Exhibit D-10.)

Mr. Hull: May I look at the check stubs?

Mr. Barshay: I am going to offer them in evidence. Let me have them, please.

Q. I show you these check stubs and ask you whether or not they are the original records of your concern. Give

me the first date of the first book, please, and the last date. A. January the 17th, 1942, December 31st, 1944.

Q. And do they contain the stubs of all the checks made out by your concern to the Fresh Grown Preserve Corporation? A. They do.

—390—

Q. The checks which are in evidence? A. Yes.

Q. Do they? A. Yes.

Q. And they were examined by Mr. Wedel? A. They were.

Q. Who testified for the Government? A. Yes, sir.

Mr. Barshay: I offer them in evidence.

The Court: Mark them.

(Received and marked Exhibit D-15.)

Q. Now there came a time when Government agents started to come to your place of business to investigate the entire transaction. A. Yes, sir.

Q. About how many came all together? A. I believe there were eight separate investigations.

Q. Did you cooperate with each and every one of them? A. I did.

Q. Did you submit your books to them? A. Yes, sir.

Q. Did you ever refuse any document or paper record of any kind to any of those men? A. No.

Q. Did you sign affidavits for them? A. Yes, sir.

Q. Did you ever refuse to sign any for them? A. No, sir.

Q. You remember Mr. Wedel, don't you? A. Yes, sir.

Q. He was one of those men? A. Yes, sir.

—391—

Q. Did you ever make any representation that you sold Greenberg syrup to any exempt agency? A. No, sir.

Q. In exact figures did you purchase from the Fresh Grown Preserve Corporation vanilla flavored syrup of 1,590,459 gallons? A. Yes, sir.

Q. And did you pay unto the Fresh Grown Corporation from your accounts $1,256,281.73? A. Yes, sir.

Q. And did you pay to Frank Citron and Kranski a total sum for cartage of $48,824.91? A. Yes, sir.

Q. And did you pay to the McCormack Corporation for trucking $15,093.07? A. Yes, sir.

Q. Every penny received by you from the National Biscuit, American Tobacco, Loft Company and others revealed itself in the book and was examined by the Government, isn't that so? A. That is correct.

Q. You reported all this to the Internal Revenue Office, did you not? A. Yes, sir.

Q. Did you pay unto Doctors in the form of checks the sum of $12,732.05? A. Yes, sir.

Q. And did the barrels cost you approximately $45,000? A. Yes, sir.

Q. Was that paid by check? A. Yes, sir.

Q. Does any single transaction that you had with Greenberg reveal itself in cash in any shape, manner or form that is not revealed in the books? A. No, sir.

—392—

Mr. Barshay: I think that is all, your Honor. Oh—one question, if you don't mind, Mr. Hull, I beg your pardon.

Q. Did you prepare these signs, "Drink Sero's Syrup"? A. Yes.

Q. And did you put it on the machine in the canteen in the Navy Yard? A. That is correct, on the canteen machine.

Q. And in the defense plants? A. That is correct.

Cross Examination by Mr. Hull:

Q. How much money did you receive from the National Biscuit Company altogether? A. Over a million and a half dollars.

Q. Could you give us the exact amount? A. No, sir. I can total it from my books.

Q. You can total that and be able to give us the figure after the noon recess, can you not? A. I think so.

Q. All right. Mr. Sealfon, before you wrote the letter that is dated March 3, 1943, you already knew that you could sell vanilla syrup to the National Biscuit Company, imitation vanilla syrup, didn't you? A. Yes, sir.

Q. You already knew that you could sell the National Biscuit Company as much imitation vanilla syrup as you could obtain? A. Yes, sir.

Q. When you drew up the contract which you dated March 10, 1943, you were contracting with the Fresh Grown Preserve Company to buy imitation vanilla syrup, weren't

you? A. That is correct.

Q. Nothing else? A. No, sir. We did buy a few other items but in the main it was imitation vanilla syrup.

Q. You had never sold any imitation vanilla syrup, you say, at the Brooklyn Navy Yard, had you? A. Absolutely not.

Q. Had you ever sold any imitation vanilla syrup to Republic Aircraft? A. No, sir.

Q. General Aircraft? A. No, sir.

Q. Sheepshead Bay Training Station? A. No, sir.

Q. To any other war defense plants? A. No, sir.

Q. Through Long Island—

The Court: Did you sell any kind of syrup to those plants?

The Witness: I did, sir, my regular line of syrups, to every one of those places mentioned by Mr. Hull.

Q. You sent this along with the letter of March 3, along with the letter of March 10, and with the contract for the imitation vanilla syrup, didn't you? A. Yes, sir.

Q. You knew the purpose of the R-315 application before that, didn't you? A. Yes, sir.

Q. You filed one with the board, your own ration board in December, 1942? A. That is correct.

Q. And you obtained an allotment, replacement of sugar? A. I don't remember, Mr. Hull, whether I obtained it or not.

Q. I refer you to this R-315 application which is dated

December 23, 1942. Did you fill that out? A. Yes, sir.

Q. In your own handwriting and signed it? A. Yes, sir.

Q. And you attached a letter to the application which is attached here, did you not? A. That is correct.

Q. And it called for replacement of 133 gallons of drink syrup, orange, grape, cherry, cream soda, root beer, et-cetera, delivered to the U. S. Navy, Pier 92, N. R., New York City? A. Yes, sir, that's correct.

Q. And you obtained the signature of a chief yeoman of the United States Navy on that letter? A. I did *not* obtain it, Mr. Hull.

Q. Well, it was obtained? A. The people I shipped it to obtained it for me. They delivered to these places mentioned and got the receipt for it.

Q. And turned over— A. The receipt to me.

Q. —this letter to you? A. That is correct.

Q. And you used it in applying to the board? A. That's right, that is the receipt.

Q. And you then intended to indicate that the United States Navy, as stated here, was an exempt agency? A. It was—I have a receipt from the United States Navy, Mr. Hull, right here on this letter.

Q. And you got that replacement; it was allowed, wasn't it? A. That's correct.

Q. Now, Mr. Sealfon, you previously—

—395—

Mr. Hull: May this be marked for identification?

(Paper marked G-35 for identification.)

Q. You had been doing business with this concessionaire over at the Brooklyn Navy Yard in 1942, hadn't you? A. Yes, sir, correct.

Q. You were doing business at the time you filed your first replacement application, #310 with the ration board? A. No, I think we started almost immediately after that, around that time, Mr. Hull; I couldn't place the exact time.

Q. In July, 1942 you tried to get a replacement for that, didn't you? A. That is correct.

Q. And you also included in your application to the ration board, to your ration board, the name of General Aircraft Company, didn't you? A. That is correct, too.

Q. And also the name of Republic Aviation Corporation? A. That is absolutely correct.

Q. And those are two of the names that are listed in the letter of March 3, 1943? A. That is correct.

Q. Is this a letter that you wrote to your ration board on July 13, 1942? A. Yes, sir, that's correct.

Q. You said this in the letter, didn't you: "We attach herewith application for additional sugar and we wish to advise you that these sugars are used to manufacture products consumed exclusively in the Brooklyn Navy Yard and various defense plants throughout Long Island and

Brooklyn." You said that, didn't you? A. That is correct.

Q. Why didn't you say, "Automatic Canteen"?

Mr. Barshay: I object.

Q. (Continuing) Or whatever the name of it was at the Brooklyn Navy Yard.

Mr. Barshay: I object to it as calling for an operation of his mind.

Mr. Hull: We are interested.

The Court: If it goes to intent, certainly intent is a mental operation.

Mr. Barshay: If that is the purpose I withdraw the objection.

A. Because at that time, Mr. Hull, there was never a definite listing of what were exempt agencies.

The Court: No, the question is why when you mentioned the Brooklyn Navy Yard you didn't mention the fact that it was for this vending company.

The Witness: Because when I had spoken—I spoke at that time, your Honor, not only to the vending company but to the OPA and to my sugar broker.

The Court: "In the Brooklyn Navy Yard."

The Witness: I don't understand.

The Court: In the Brooklyn Navy Yard.

The Witness: The Canteen in New York, your Honor.

The Court: The question is now why didn't you

mention that for the Brooklyn Navy Yard you sold not to the Navy Yard but to the Canteen.

The Witness: I didn't think there was any reason for it at all.

The Court: All right.

Q. You attached to this letter several other letters that you obtained from customers of yours, didn't you? A. That is correct.

Q. One was from the Automatic Canteen Company of Long Island, wasn't it? A. Yes, sir.

Q. That is dated July 14, 1942. One is from The Canteen, 304 East 23d Street, New York, N. Y. Isn't it? A. Yes, sir.

Q. It is dated July 14, 1942? A. I don't deny any of that.

Q. And in that letter which—you submitted this with your R-31r application, didn't you? A. Yes, sir.

Q. Trying to get replacement? A. That is correct.

Q. You knew that replacement was only for the exempt agencies? A. At that time we didn't know what were exempt agencies, Mr. Hull, that was the reason for this application.

Q. You knew that the replacement provision of OPA for sugar only allowed replacement for sales to exempt agencies, didn't you? A. That is correct.

Q. And you attached this letter which said the following on the stationery of The Canteen, 304 East 23d Street,

"Sero Syrup Company, 50 North 11th Street, Brooklyn, New York: Dear Sir: As you undoubtedly know from your records you have been delivering to the United States Navy, Brooklyn, New York for our account about 500 gallons per week for the past four weeks. We expect a substantial increase in demand during the next few weeks due to the additional personnel at the yard and the warmer weather. Kindly make arrangements to take care of this

additional business." You were willing to submit that letter, weren't you? A. I was told by Mr. Collins to include the letter on behalf of The Canteen and I submitted it with his knowledge.

Q. Why didn't you tell Mr. Collins to change this part of it: "You have been delivering to the United States Navy, Brooklyn, New York", why didn't you tell him to change that and put the name of the concessionaire you were dealing with? A. I never tell anybody how to write letters for me. They write the letters themselves.

The Court: Did you see the letters that he wrote?

The Witness: Yes, sir. The letter was sent to me. I don't deny it.

Q. In your own letter you said, "In the Brooklyn Navy Yard;" you didn't distinguish in your own letter, did you? A. I don't know what you are referring to, Mr. Hull.

Q. You had another one from General Aircraft Corporation, that was dated July 9th? A. I had a photostatic copy from them, too.

—399—

Q. And this letter from General Aircraft that you submitted said this, didn't it: "We consider your deliveries of foodstuffs to our factory an essential part of our daily routine and are pleased to state that it definitely does increase our war production schedule through added energy. We rely on this service in particular for practically all our in between meal pick-ups." You wrote that letter? A. I didn't write it.

Q. I withdraw it. You sent this letter along with your R-315 application and your letter of July 13th? A. Your Honor, can I explain these letters?

The Court: Yes.

A. I was told, Mr. Hull by all these people to include these letters because at that time there was nothing definite as to what were exempt agencies and what were not exempt agencies.

The Court: Well, did you have to submit them because they told you?

The Witness: No, your Honor. I wanted to get that correct.

The Court: You did it of your own free will?

The Witness: That's right. They needed more syrup at those plants and at that time no one knew if they were exempt agencies. It was warm weather, they were civilian employees of the camps and we

were told to submit it and if we could get the sugar back—in fact, at that very time at the OPA they brought out a folder with letters from the Coca Cola Company with the exact same statement.

The Court: Were the statements in the letters which they submitted that they sold to the Navy Yard?

The Witness: Same type of letters, your Honor, the same as I had.

The Court: No, answer the question. You are making a statement. Now I am asking you if the letters submitted by the Coca Cola Company contained the same statements contained in the letter submitted by you that their syrups were sold to the Brooklyn Navy Yard when they were sold to a vending company.

The Witness: Your Honor, the application submitted by Coca Cola had not only these statements in but dozens of others.

The Court: Did they have that statement in it?

The Witness: I didn't look closely enough.

The Court: Then you don't know whether it had or not. Don't say, "Not only this statement."

The Witness: OPA told me at that time when they rejected my application, I said, "I want to go on further, I want to go to Washington on it." They told me that I was wasting my time and they took out the folder of the Coca Cola Company and made the identical application.

—401—

The Court: Well, did Coca Cola make the identical application with the identical type of statement?

The Witness: I didn't inspect the letters, your Honor.

The Court: That's all we are concerned with.

Q. You say now that your purpose in submitting this form was to find out whether these names of your customers

would be regarded by OPA as exempt agencies? A. I didn't say that at all.

Q. Well, is that what your object was? A. My object was if they were exempt agencies to get the sugar back.

Q. But you told us that you didn't know whether they were or not and you were using this means of finding out? A. That is what the OPA told me to do.

Q. All right. That is what you were trying to do when you filed this application and these letters, is that right? A. Correct.

Q. You had another one, Edo Aircraft Corporation, is that right? Then you had one Republic Aviation Corporation, is that so? A. Yes, sir.

Q. And that letter said: "This is to advise that our plant workers consume approximately 50 gallons of Coca Cola syrup a week dispensed through canteen machines for refreshment purposes. We consider this an essential part of

our effort to reduce fatigue thereby increasing the efficiency and productive output of our workers." That letter you sent in along with the application for the same purpose? A. Yes.

Q. And that is one of the names that you listed in the March 3 letter, isn't it? A. Which one is that?

Q. Republic Aviation Corporation. A. We delivered directly to them.

Q. You also had some other letters in here all submitted for the same purpose? A. That is correct.

Mr. Hull: I would like to have this marked for identification.

The Court: Mark it.

(An exhibit is marked G-36 for identification.)

Q. This application was rejected, wasn't it? A. It was.

Q. You weren't satisfied to let it rest at that, were you? A. I think we made another application. We were advised to do that.

Q. You sent a letter to the board dated July 22?

The Court: To which board, his own board?

Q. Your own war price and ration board, Brooklyn, New York, dated July 22, 1942? A. Yes, sir.

Q. That was after the first one dated July 15, that is the R-315, dated July 15, had been rejected, right? A. That is correct.

—403—

Q. You said: "We submit herewith a special purpose application for an adjustment on our regular sugar requirement for the months of June and July. We understand that we cannot secure a replacement of sugars for the purpose we are using same as per your letter of July 17". It was by letter of July 17 that the board had told you that the first one was rejected, wasn't it? A. That is correct.

Q. Then you went on to say: "We have, however, used our sugar very freely on the assumption that we could immediately replace the same due to the fact that we were making deliveries to defense plants and to the Brooklyn Navy Yard. We went under this assumption on the information contained in letters of our sugar brokers B. W. Dyer & Company. We enclose these letters dated May 19

and June 26." Now why didn't you, instead of saying "Brooklyn Navy Yard" in that letter specify that it was a concessionaire over there? A. No reason, Mr. Hull. In fact, you answer my own argument. You have a letter from B. W. Dyer and Company. I was advised by more than one person that what I was doing was correct. They wouldn't do anything that wasn't correct.

Q. Did you think there was any difference as far as exemption was concerned between sales to the United States Navy or sales to a concessionaire? A. Mr. Hull, I explained before at that time no one in the Government itself knew which were replacement agencies.

—404—

Q. Why didn't you put the name of the concessionaire in your letter? A. For no reason. I was the manufacturer. The manufacturer made the application, not the concessionaire.

Q. All right. Now this application finally went to the state headquarters, the state director in New York, didn't it, for the OPA? A. I asked that it be sent there.

Q. And it was rejected there, wasn't it? A. Yes, it was.

Q. And before he acted on it he submitted it to Washington to the OPA? A. I don't know whether he submitted it to Washington.

Q. Do you deny that he did? A. I don't know.

The Court: Well, if he doesn't know that's enough.

Q. At any rate you found out that you couldn't get replacement for this purpose, didn't you? A. That is correct.

Q. And you knew that way back in July and August of 1942? A. Absolutely correct.

Q. And you knew it when you wrote the letter that is dated March 3, didn't you? A. That is correct.

Q. Mr. Sealfon, did you ever write a letter of this nature to any other customer of yours, any other person from whom you were buying syrup? A. I wasn't buying syrup from anyone else at that time, Mr. Hull.

Q. You discontinued purchases from all other sources? A. No, after that, subsequently I bought from some people.

Q. When did that start? A. I don't know whether it

—405—

was during the time I was buying from Fresh Grown or later. I know I was trying to buy syrup at all times. That was my business.

The Court: Did you furnish letters of this type to any other people from whom you bought syrup?

The Court: No, I didn't. They didn't ask for it, your Honor.

Q. Did you purchase syrup in amounts that were above your quota from anybody else? A. I don't think my quota had anything to do with purchases, Mr. Hull, because I was buying an unrationed product; I could buy any amount I wanted. My lawyer advised me as to that.

Q. Now would you mind answering my question?

(Question repeated by the reporter.)

The Court: Did he have a quota on syrup?

Mr. Hull: All right. I think I am inaccurate about that.

Q. Did you purchase syrup with a sugar content that would be above your quota from anybody else?

The Court: I don't see the purpose of that question.

Mr. Hull: I will not press it.

Q. How did you calculate the amount that you were going to pay Doctors? A. We had no specific arrangement, Mr. Hull.

Q. What was the arrangement? A. Just that I would pay him a finder's commission on what I bought.

—406—

The Court: No specific commission?

The Witness: No, sir.

Q. Who was to decide how much to pay? A. I was.

The Court: On what basis did you pay him?

The Witness: On whatever I bought, your Honor.

The Court: I mean any percentage.

The Witness: No, sir.

The Court: Well, what do you mean on whatever you bought?

The Witness: On the gallonage I bought.

The Court: Did you pay him so much a gallon?

The Witness: Approximately that's the way we arrived at our figure.

Q. You call it a finder's commission? A. Yes, sir.

Q. Did you pay him on the occasion of each purchase or not? A. No. At the beginning we did and subsequently we just sent him a check, either he asked me every week or every couple of weeks; I don't know the amount. You have it there.

Q. Well, can you tell us why you gave him a payment as late as August 20, 1945? A. Yes, I can.

Q. What about that? A. When he went into the service, Mr. Hull, he come over to me and told me he is going into the service and he would like his wife to get an income as long as possible. I said, "If you want me to we will accumulate it on our books and send her an almost equal amount

every month." When he came back from the service his wife was still receiving checks and after he was subpoenaed over here, I understand, to the Grand Jury, he called me up a couple of days later—

Q. How do you know he was subpoenaed? A. He called me up and said he was subpoenaed.

Q. He told you he was subpoenaed? A. He called me and told me he was subpoenaed to the Grand Jury at a hearing in reference to Fresh Grown Preserve Corporation and also if there was any money due him on the books to please mail it to him and I did so the next day.

Q. How many times have you talked to Doctors since then? A. Very little, maybe once.

Q. On what basis did you calculate the amount that you finally did send him? A. Approximately three-quarters of a cent per gallon.

Q. Why didn't you obtain a letter—

The Court: You say three-quarters of a cent per gallon?

The Witness: Yes, sir.

Q. Why didn't you obtain the letter that he sent you on June 23d sooner? Do you know the letter I am talking about? A. Yes, I do.

Q. What about that? A. It wasn't drawn to my attention that we had not deducted the 20 per cent commission.

—408—

In fact very few business men know that a commission is the same as salary and if you pay a man commission you must deduct 20 per cent withholding tax. When it was drawn to my attention I immediately drew it to Mr. Doctors' attention.

Q. Who drew it to your attention? A. My accountant.

Q. Mr. Rosen? A. Probably.

Q. Was he classified as your employee on your books? A. Who?

Q. Doctors? A. No, sir.

Q. Well, why did you have to concern yourself with it? A. Because that happened to be the law, Mr. Hull. Any commission paid to anyone is the same as a salary unless the man acts as an independent broker.

The Court: If he is working for you; was there any pretense at any time that he was working as an employee of yours?

The Witness: No, sir, never. The law assumes for that purpose, they ask the employer to deduct

the withholding tax which I would have done, and he wanted to get that 20 per cent to pay his own tax.

Q. Well, you knew that he was working for Kraemer during the time that negotiations took place? A. He was a salesman for Kraemer and Company.

Q. You had never done any business with Kraemer before that? A. Never.

—409—

Q. But you did go into Kraemer's office to draw up the contract? A. That's right.

Q. How did you come to do that? A. I understand at that time Mr. Kraemer was representing Mr. Greenberg. He was a broker in the transaction for Mr. Greenberg.

Q. I see. And not Mr. Doctors? A. No, sir.

Q. Well, how did Doctors suddenly become an independent broker then?

Mr. Barshay: I object. That is a question of law, your Honor ruled.

The Court: Well, I don't think this man is entitled—the thing is that he says Doctors wrote him a letter that he was an independent broker. Now whether he was or not the jury might take into consideration.

Q. You say now that Kraemer was the broker for the Fresh Grown in this thing? A. For the Fresh Grown. Doctors was my broker, if you want to put it that way.

Q. He was your broker? A. That's right.

Q. Why wasn't Kraemer your broker? A. I never knew Mr. Kraemer.

Q. You were at his office and met him?

The Court: You had a broker, didn't you, Dyer?

The Witness: Dyer, on sugar.

Q. You also paid Dyer and Company brokerage commission for every bit of sugar that you sold to National

—410—

Biscuit, I mean of syrup, didn't you? A. Yes.

Q. Do you know how much you paid them? A. I don't know the exact amount.

Q. Can you have that figure for us after the recess? A. Yes, sir.

Q. All right. I will ask you about that. Now, why didn't you tell the National Biscuit Company to go and collect a finder's commission from Dyer and Company?

The Court: I will sustain your objection.

Mr. Barshay: The answer is obvious, your Honor.

Mr. Hull: I meant that just the opposite, didn't I? I may not ask that, your Honor?

The Court: No.

Q. Just the transactions for the imitation vanilla syrup were handled in cash, weren't they, between you and the Fresh Grown Preserve Company? A. I think from a certain period all the transactions were handled in cash.

Q. When did that period begin? A. I think it was toward the middle of May, Mr. Hull.

—411—

Q. Would it be the date of the last check that is in these exhibits? I show you Exhibits G-5, G-6 and G-7. A. There

may have been a few after that, Mr. Hull. I don't know off-hand.

Q. Well, May 15th is the date of the last check there, isn't it? A. Yes, sir.

Q. And from then on there was cash, the deals were in cash, weren't they? A. Approximately.

Q. You began making out checks to Citron on June the 1st, you said, didn't you? A. I don't remember the exact time, Mr. Hull.

The Court: You cashed a few checks yourself?

The Witness: I was just going to add that.

The Court: Then shortly after that you made them out to Citron.

The Witness: Thank you, sir.

Q. Did you give Citron the cash on those checks that were cashed, the ones that you cashed yourself? A. I put them in an envelope and gave them to him.

Q. All together you gave Citron over a million dollars in cash, didn't you? A. I didn't give him a million dollars in cash.

Mr. Barshay: I object to that.

Q. I don't mean all at one time.

The Court: No, over the period during which you

instructed the cash for delivery to Fresh Grown, how much did that amount to?

The Witness: It was over a million, but I made out the checks to Mr. Citron; I didn't give him the cash.

The Court: You made out the checks.

The Witness: Yes.

The Court: But the cash represented a sum in amount over a million dollars which he was entitled to cash for the purpose of taking to the Fresh Grown.

The Witness: Yes, sir.

Q. He took over a million dollars in cash away from Brooklyn and over to the Fresh Grown Preserve Company. A. Approximately.

Q. And you had no hesitation in giving Citron, a truck driver, that amount in cash. A. Would you like me to explain that, Mr. Hull?

Mr. Barshay: I object to that. He didn't say that.

The Court: He gave it to him, whether he had any objections. He testified he gave it to him. He gave him checks which were for over a million dollars, which he was entitled to cash.

Mr. Hull: All right.

The Court: And deliver the cash to Fresh Grown.

Q. After the transactions in cash started did you give any more checks for any reason to the Fresh Grown Pre-

serve Company? A. I may have on several occasions, I don't remember, after that immediately.

Q. Isn't it a fact that you did give the Fresh Grown Preserve Company checks whenever it didn't relate to the imitation vanilla syrup transaction? A. I don't think so.

Q. Would there be a reason for handling that transaction differently from the others? A. No, unless it was shipped directly from the warehouse to some of my accounts and Mr. Citron didn't take the money over; that's all.

Q. Well, why not handle it— A. I don't see any reason for it.

The Court: Well, as a matter of fact, were the transactions which covered delivery of syrups other than the imitation vanilla paid for by check?

The Witness: I don't think so, your Honor.

Q. Were invoices made out by Greenbergs and submitted on any such occasions when you had a transaction aside from the imitation vanilla syrup? A. I don't think so.

Q. Then please look at this one dated June 10, 1943, which is your check to the Fresh Grown Preserve, Inc. for $3,474. A. That's correct.

Q. That's June the 10th. A. That's right.

Q. And it is accompanied by an invoice on the stationery of Fresh Grown Preserve Corporation, N. J., and it calls for a quantity of cola flavored syrup and root beer flavored

syrup. A. Would you like me to explain it to you?

Q. I certainly would. A. All right, I will do it. If you will go back to these checks right here (indicating), you will

see that they were made out all to Fresh Grown Preserve, in my handwriting; every check—

Q. Which checks are you talking about? A. Right here. I mean these checks were made out here at the beginning.

The Court: Is that Exhibits 5, 6 and 7?

Mr. Hull: Yes.

The Witness: Whatever exhibits they are.

A. (Continuing) When you come into this exhibit, evidently we got a call for syrups and shipped it out, as I recall it, to one of the Government camps; it wasn't replacement or anything like that, and I came over and shipped it or got the bill of lading at the plant; I didn't have any cash with me, so I made out a check. As you can see, it is all made out in my handwriting.

Q. So that this transaction was aside from the deliveries to the National Biscuit, wasn't it? A. It was additional syrup.

Q. Yes. And you didn't handle that in cash. A. Because I shipped it out to those people. I didn't want Greenberg at that time to know where it went to, neither.

Q. You shipped out every bit of imitation vanilla syrup by your trucker, you shipped it over to National Biscuit

Company. A. That's correct.

Q. Where is the difference? A. The difference is that this went to a different location.

Q. You didn't want him to know about any location, you told us. A. That's right; that's correct.

Q. That's the best explanation you can give about—
A. That is the explanation.

The Court: That is the explanation he gave.

Mr. Hull: Yes.

The Court: I think we will recess now until ten minutes before two.

(Noon recess.)

AFTERNOON SESSION

ROBERT SEALFON, resumed the stand.

Cross Examination by Mr. Hull (Continued):

Q. Mr. Sealfon, did you obtain the total figure of receipts from the National Biscuit Company? A. Yes, I did, Mr. Hull. We are not sure according to our books the exact date that we stopped doing business with National Biscuit with Fresh Grown Preserve merchandise and I have got two figures here. If we stop on May 31, 1944, it is a total of $1,482,233.41. That included some other business besides Fresh Grown business; we can't separate them on our books —we don't. If we stop on 6-23-44, the total would be $1,522,597.01.

—416—

Q. I show you Exhibit G-30 and call your attention to the fact that the last purchase order is dated June 23, 1944. A. Well, then, the latter figure is correct, Mr. Hull; $1,522,597.01.

Q. You say that also includes other sales to National Biscuit? A. Yes.

Q. In addition to what you purchased from the Fresh Grown Preserve Company? A. That is right, yes, sir.

Q. Are you able to approximate in any way the amount that— A. No.

Q. —does not relate to the Fresh Grown account? A. We tried to, during the lunch hour, Mr. Hull, but it is impossible to do it or to separate it.

Q. All right. Can you say whether the biggest part of your transactions with National Biscuit related to the Fresh Grown account? A. Without any question.

Q. Would you fix a percentage at 75 or 80— A. I would be afraid to, Mr. Hull; I don't know.

Q. Well, is it a great majority— A. Yes.

The Court: 98 percent of all the syrup you received from Fresh Grown went to National Biscuit.

The Witness: Yes, sir. And everyone is on my books.

The Court: And your payments to them amounted to $1,500,000.

The Witness: Yes, sir.

Q. All right. Can you tell us what the total was approxi-

mately that you paid to the Dyer & Company for brokerage in connection with sales to National Biscuit? A. The total amount—that also includes a few other transactions, Mr. Hull—was $32,326.94.

Q. Was the biggest part of that made up of sales through the Fresh Grown account? A. Yes, sir; yes, sir.

Q. Do you know whether there were eighteen checks that you made out to cash in May, 1943, and you cashed them yourself and gave the money to Citron? A. I don't know the exact amount but there were, I think, thereabouts.

Q. See how many checks there are in May, 1943, in this group which is part of Exhibit G-30. A. What do you mean? The total amount, Mr. Hull?

Q. No, how many checks. A. All together?

Q. Checks made out to cash and cashed by you.

The Court: Mr. Hull and Mr. Barshay.

(The Court and counsel conferred at side bar off the record.)

A. I see thirteen here cashed by me, Mr. Hull.

Q. Well, is there one dated April 29th? A. Yes, sir, there is.

Q. May 6th? A. May 6th, yes.

Q. Both of those were for $1050, weren't they? A. That is correct.

Q. May 3rd is there one for $1050? A. No.

—418—

Q. You don't find that there? A. No, sir. It is here, but it is not made out—not cashed by me.

Q. By whom is it cashed? A. It is deposited to the account of Fresh Grown Preserve Corporation.

The Court: Made out to whom?

The Witness: Fresh Grown Preserve Corporation.

Q. All right, May 10th. A. I cashed that one.

Q. May 10th another one. A. Made out to the Fresh Grown Preserve.

Q. May 13th. A. No.

Q. None there for May 13th? A. No.

Q. May 18th? A. Yes, sir.

Q. May 20th? A. Yes, sir.

Q. May 20th again, two checks for $1200 on May 20th? A. Yes, sir.

Q. May 21st another one for $1200. A. Yes, sir.

Q. May 22d, $1200. A. Yes, sir.

Q. May 24th, $1200. A. Yes, sir.

Q. Another one on May 24th for $1200. A. Yes, sir.

Q. May 25th, cash, $1200. A. Yes, sir.

Q. And one on May 25th for $75? A. Not made out to me.

Q. How was that made out? A. Frank Citron.

Q. What would that be for? A. Well, I would assume it was trucking, but I would have to look at my books.

—419—

Q. May 27? A. Yes.

Q. May 28? A. Made out to Frank Citron.

Q. Then it was about the first of May or sometime in May that the cash transactions started, wasn't it? A. Yes, sir.

Q. And for a period of time you made out checks to cash principally? A. Yes, sir.

Q. And then you cashed them yourself? A. Yes, sir.

Q. Did you give the cash to Citron to take over? A. Yes, I did, in an envelope.

Q. Well, that wasn't in a thin envelope, was it? A. Pardon me, sir?

Q. That was not in a thin envelope, was it? A. Yes, it was always.

Q. What denomination of bills? A. The largest bill I could get at the bank, Mr. Hull, in fact, we got thousand dollar bills at that time.

Q. What brought about the change of system whereby the checks were made out to Citron from then on? A. For no reason except that he was going there with it and I wasn't. It was easy for him to take it over while he was going there.

Q. And that started about June 1st? A. Thereabouts, I don't know the exact time.

Q. And in the same month of June this letter came in from Doctors, didn't it? A. I don't know the date, Mr. Hull,

you have the letter there. If you will bring it to my attention I will tell you.

(Letter is handed by the clerk to Mr. Hull and by Mr. Hull to the witness.)

A. The letter is dated June 26, 1943.

Q. Is there any connection between the two things? A. None whatsoever. The first time it was drawn to my attention, in fact.

Q. Tell us again what you had to say before about the—(withdrawn). Tell us again the circumstances under which that letter was received by you. A. This letter here?

Q. Yes, sir. A. It was drawn to my attention that I will have to take 20 per cent withholding tax out of Doctors'

commission. I communicated that to Mr. Doctors. He said not to take it off, that he was an independent broker and was getting a finder's commission. He said he would send me a letter to that effect which he did.

The Court: That was done in response to your suggestion?

The Witness: Your Honor, it was my suggestion in so far as he didn't want me to take off a 20 per cent reduction.

The Court: Who brought up the 20 per cent first?

The Witness: I had to because the law was—

The Court: I am not asking who had to but who did.

—421—

The Witness: I did.

Q. Doctors didn't submit the letter to you out of the sky? A. No, sir.

Q. The contract under which you were receiving this merchandise from Fresh Grown was drawn up in Kraemer's office? A. No, sir.

Q. Didn't you say that? A. I did not say that.

Q. May I refer to his testimony, your Honor—I think perhaps I am inaccurate. It was discussed at Kraemer's office? A. Yes.

Q. Why was it discussed there? A. That is where Greenberg said he would meet me.

Q. Did you tell Greenberg that you were dealing with Doctors and not Kraemer? A. No, sir.

Q. Why didn't you? A. I didn't have to.

Q. Whom did you consider to be the agent, the broker for Greenberg? A. I answered that question before, Kraemer and Company.

Q. You knew Doctors was Kraemer's employee? A. He was a salesman for Kraemer and Company.

Q. When Doctors first talked to you about vanilla syrup it was in January, 1943, wasn't it? A. Yes, sir.

Q. And that is the only kind of syrup that you discussed with him? A. We didn't discuss any particular flavor, Mr. Hull, we discussed flavored syrup.

—422—

Q. You didn't discuss imitation vanilla syrup? A. No particular flavor, just flavored syrup.

Q. You knew then, did you not, that you had a chance to sell to the National Biscuit Company? A. No, I did not.

Q. When did you find that out? A. Not in January. I found it out after the first delivery.

Q. After what? A. After we got the first delivery from Fresh Grown Preserve.

Q. January 15? A. It was about that, between that and the next shipment because the next shipment went direct to the National Biscuit themselves and we made the contract and consummated the sale.

Q. You took a sample to the National Biscuit Company? A. I certainly did.

Q. When did you do that? A. I don't know the exact time—between those two dates.

Q. You were only at Longchamps Restaurant once with Greenberg? A. Yes, sir.

Q. And that was toward the end of 1944? A. Yes, sir.

Q. Was that the first time you were at Longchamps? A. No, sir.

Q. Had you been there frequently? A. I wouldn't call it frequently, occasionally.

Q. How frequently? A. I can't recall that, Mr. Hull.

Q. Give us your best recollection. A. It would simply

—423—

be a guess. Why should I guess at that? I eat anywhere in New York, no particular place.

Q. You have a charge account at Longchamps, do you not? A. That is correct.

Q. When was that opened up? A. I think either the middle or toward the end of 1944.

Q. Now, prior to that how frequently did you eat there? A. Not so often.

Q. I would like to have your best recollection. A. I would have to make a guess at it.

The Court: Did you eat there once a month, four times a month?

The Witness: I could make a guess and say once a month; that is simply a guess, I have no way of knowing how often I eat there or anywhere.

Q. From what time on did you eat there approximately once a month? A. I couldn't answer a question like that, Mr. Hull. I don't know, I simply would be guessing again.

Q. Did you discuss with anybody the matter of making our purchase orders to cover these transactions? A. Surely, it came up in the course of regular business.

Q. Well, with whom did you discuss it? A. I would presume with my accountant because I wouldn't discuss anything of that sort.

Q. What was the arrangement that was made after dis-

cussion with your accountant concerning purchase orders? A. About the same arrangement we made, pay the checks to Frank Citron, he signed the receipts for the checks, took the money,—cashed the checks at the bank and took the money to Fresh Grown.

Q. Why did you retain the originals of the purchase orders in your file? A. Why? That was my receipt for the checks, Mr. Hull.

Q. Why didn't you send them on to the person you were buying the merchandise of? A. I sent the duplicate on.

Q. Did you tell Citron to give duplicates? A. I don't remember discussing it with Citron one way or the other, I gave it to Citron; what he did with it I don't know.

Q. Did you give it to Citron to deliver to Greenberg? A. I gave it to Citron with the check.

Q. Did you give it to Citron to give it to Greenberg? A. If you want to look into my mind to see what I was thinking—

The Court: No, did you give instructions to Citron to give it to Greenberg?

The Witness: Your Honor, I gave the purchase order to Citron with the check.

The Court: I asked you a direct question, did you give instructions to Citron to give these purchase orders to Greenberg?

—425—

The Witness: I don't remember, sir.

Q. You have said that you gave him instructions instead of sending the original to the seller to send the copy? A. I don't think that makes any difference, we do that in our business. Sometimes we give people a duplicate, sometimes the original.

Q. The people you are buying the merchandise from? A. Or that we sell to. Sometimes the truckman makes a mistake, gives the original or gives the copy, it doesn't make any difference as long as you have a receipt.

Q. In the normal course of business the man you are selling to or buying from gets a record of that sort? A. I would say yes.

Q. Why didn't that happen in this case? A. I don't know that it didn't happen until I heard it in court.

Q. This is the first time you knew that Citron wasn't handing the duplicate purchase orders over to Greenberg? A. Yes, I think that was the first time.

Q. You learned that in court? A. Yes, sir.

Q. Didn't you instruct Citron to make sure to keep those duplicates so that he could preserve his own records? A. I did not, sir.

Q. You didn't? A. No, sir.

Q. Weren't you anxious to have records that would look good on the face of them about this transaction? A. No,

—426—

sir, Mr. Hull, I kept my books the same as we always had.

Q. You always make out purchase orders and keep the

original? A. When we buy merchandise and are sending truckmen for it, yes, we send a purchase order along with the truck to give it to him; whether he gives it to the people or keeps it for himself we have no way of knowing.

Q. In all your dealings with customers that you are buying from do you make out purchase orders and keep the original? A. No, sir. Where we have a product delivered right to our plant we get a receipt right at that time.

Q. Did you ever have any dealings with any other customer in which you didn't do that, that is to say, didn't receive it at your plant and get receipts? A. I presume that we did.

Q. Name one. A. I can't remember, Mr. Hull, I would have to go to the records and find if we did that; they are all in my records, I cannot remember every little detail of my business, it is impossible.

Q. Can you get from your records the name of any customer whose account you handled the same as this one? A. I never handled any other account the same as this one.

Q. This was strictly irregular, wasn't it?

Mr. Barshay: I object.

A. I wouldn't call it that.

Q. I withdraw it. It was different than any other account you ever handled? A. It was the biggest account I had, Mr.

Hull.

The Court: Was it different in any other way than being a big one, different in method of handling?

The Witness: Yes, sir.

Q. With all these purchase orders? A. Yes, sir.

Q. You knew that the National Biscuit Company would keep accurate records of these transactions with you, didn't you? A. I assumed so.

Q. Was that one reason why you wanted to have these purchase orders to be in your file? A. No, we wanted a record that we gave Citron a check; we had to have a record of what we gave him and why we gave it to him, that's all.

Q. Well, you could have obtained a receipt from Greenberg if you wanted a record, couldn't you? A. I wanted to send the duplicate along with the truckman.

Q. For what purpose? A. So he knows what he is getting.

Q. Why didn't you get a receipt from Greenberg? A. He wouldn't give us a receipt.

Q. But you wanted Greenberg to have the duplicate that you gave to Citron so that he, Greenberg, would have a record of it? A. That's right.

Q. It is a surprise to you now to find out that Greenberg never got those duplicates? A. That's right.

Q. I show you Exhibits D-5, 6, and 7 and I ask you

whether it isn't true that receipts from the Fresh Grown Preserve Company are attached to each one of your checks on those. A. That is correct.

Q. While you were giving a certified check you were

getting receipts? A. That's right. I think that is when the cash transaction started.

Q. Did you make purchase orders out— A. I know that we started the purchase order system around that time. I don't remember exactly.

Q. It was when the cash dealing started, wasn't it? A. It was around that time.

Q. That was the reason for it, wasn't it, because you were going to deal in cash? A. I would say one of the reasons.

Q. That was the reason why you had a discussion with Rosen about what was going on, too, wasn't it? A. I had discussions with Rosen about everything that goes on, he is my accountant.

Q. You had a particular discussion with him sometime around May, 1943, when you were shifting from certified checks to cash, didn't you? A. I don't remember the exact time. We had plenty of conversations; every couple of weeks we had a conversation.

Q. Didn't Rosen suggest to you that you had better protect yourself by having Doctors write that letter? A. No,

sir.

Q. Do you know whether Rosen ever told that to anybody? A. I don't know.

Q. Will you deny that he told that to Mr. O'Connor?

Mr. Barshay: I object.

The Court: No, I don't think we will go into that.

Q. Will you look at the last paragraph of this March 3 letter? I will read it for you: "The total amount used by these plants varies from approximately 1200 gallons to 2000 gallons per week." Is that true or not? A. At the time I thought it was true.

Q. You thought it was? A. Yes, sir.

Q. Don't you know that according to your basic quota you couldn't have delivered that amount to those plants or anywhere else? A. Why do you make such a statement, Mr. Hull?

Q. Do you know it or not? A. It is not true, your statement.

Q. What was your basic quota? A. At that time it was approximately a quarter of a million pounds of sugar a year.

—430—

Q. For the period of January and February, 1943, your basic quota was 18,165 pounds of sugar, wasn't it? A. I don't remember. You have my base quota. Let me look at it and I will tell you.

Q. Here is one that is dated December 23, 1942, covering the months of January and February, 1943. Your base quota was what? A. This is dated 12-23-42.

Q. It is for January and February, 1943, isn't it? A. I don't know what period that's for, Mr. Hull.

Q. Well, look at it. A. It is dated 12-23-42.

Q. All right. A. In the amount of 18,165 pounds.

Q. What's the next one for March and April? A. The next one is dated 10-19-42.

Q. Well, that's backwards. What's that? A. 19,110—

The Court: Can you hear the witness?

Mr. Barshay: Not very distinctly, your Honor.

The Court: Speak up, please.

A. 19,110.

Q. What was the one for—

The Court: Mr. Hull, I think probably if you stand farther away you won't be getting so confidential.

Mr. Hull: All right.

Q. Look at your application there that covers March and April 1943. That would be dated in February. A. You haven't any here for '43, Mr. Hull.

—431—

Q. Let me have it a minute. A. I just want to make sure. Here is one that's dated June 15, 1943—36,750 pounds.

Q. Well, let's see, now. Your letter says, "The total amount used by these plants varies from approximately 1200 gallons to 2,000 gallons per week." Now you tell us before we go further with that what period of time you think that refers to. A. Previous to the writing of the letter.

Q. How far before? A. Several months.

Q. Seven months? A. Several months; one month, three months. I wrote it over there in his office. I didn't sit down and figure it out.

Q. All right. A. I took an approximation.

Q. All right, then, we will start back and go back six months. Is that far enough? A. Whatever you wish.

Q. Take the one that covers March and April, 1943. Tell us how much sugar you were allowed in your basic quota for that two-months period. A. You don't have those here, Mr. Hull. You have March the 19th, 1943,—

Q. Wait a minute, now. Make sure it is the one. You filed them in advance of the period that they were to cover, did you not? A. No, I just filed them according to OPA regulations when they were to be filed, Mr. Hull.

Q. When was that? A. These were before the period.

Q. That's what I said; in advance of the period that they were intended to cover. A. That's right.

—432—

Q. Each two months you filed one. A. That's right.

Q. Now see if the one is there that covers March and April, 1943. A. I would assume that this one, 4-6-43, would cover that period. I will look on the other side. No, this covers May and June.

Q. Yes. Look for one in February. A. I have it right here, Mr. Hull.

Q. The amount of that is 32,032 pounds, isn't it? A. The base quota is 25,150 pounds, of which I was allotted 70 percent, which gave me 18,165 pounds.

Q. Now we are confused again. That was for January and February, was it not? A. That's what it is marked here on the application, Mr. Hull.

Q. For January and February. A. That's right, January and February.

Q. I want to know what you were allowed for March and April. A. 45,760 pounds was my base; 70 percent I was allowed, which the board gave me, 32,132 pounds.

Q. All right. Look at the one that covered November and December, 1942. A. My base quota was 27,300 pounds. I was allowed 70 percent—19,110 pounds, the board allowed me.

Q. And September and October, 1942. A. My base was 42,700 pounds; 80 percent I was allowed—34,160 pounds.

Q. You say that you could have delivered 1200 to 2,000

—433—

gallons per week to the people that you have named in this letter from that base quota? A. Approximately, yes, sir.

Q. Did you have some other customers during that period? A. I certainly did.

Q. Well, they took up some of your basic quota. A. That's correct.

Q. What part of your basic quota was used for your other customers besides these? A. I have no way of knowing; I have no way of knowing. It was all mixed together.

Q. Did half of your business go to these customers? A. I wouldn't guess at it, Mr. Hull; I don't know—unless you get me the total exactly, the amount of gallonage we sold during that period; and I can tell you what I sold these people during this period if we go to our books; that's the way I can tell you; I can't guess at it.

Q. Well, everything you sold to these people and to your other customers before March 3, 1943, came out of your basic quota, didn't it? A. That's correct.

Q. With the exception of the one or two replacements that you were allowed. A. That's right; that's right.

Q. And whenever you obtained a replacement, that went

to whichever exempt agency was listed. A. That is correct, yes, sir.

Q. You didn't get any extra benefit from that so far as your supply was concerned, did you? A. No, sir.

—434—

Q. You say you were able to sell 1200 to 2,000 gallons per week— A. Would you like me to explain that to you in my terms?

Q. Well, let me ask you the question first. —1200 to 2,000 gallons per week out of your basic quota. A. That's correct.

Q. Explain it in your terms. A. I will explain it. In the manufacture of our syrups we used a lot of other ingredients that we call particularly during this period sugar extenders. There is a tremendous amount of them; there are different names, and they are all on the market. We can take a pound of sugar and make it do the work sometimes of three or four pounds in the manufacture of our product; and I have continually done that from the first day the war started. That's the way I didn't buy black market sugar; I bough' sugar extenders and used it in product, and that explains exactly my business. It is very common in the syrup business. There isn't a manufacturer that doesn't do it.

The Court: Well, in the vanilla syrups you got, were there any of these extenders?

The Witness: From the Fresh Grown, your Honor?

The Court: From the Fresh Grown, yes.

The Witness: No, sir, that was pure cane syrup.

Q. At the ratio of 6.31 pounds of sugar per gallon of syrup, in order to deliver 2,000 gallons a week for two

—435—

months, you would need 144,000 pounds of sugar, wouldn't you?

Mr. Barshay: I object on the ground that he is assuming that 2,000 was the figure. He said 1200 to 2,000. It is an arbitrary—

The Court: Well, he is using the same limits in the question now as was set in the letter which was furnished by this man.

Mr. Barshay: He said from 1200 to 2,000 and Mr. Hull is taking—

The Court: Well, let's find out what was the maximum and what was the minimum.

Mr. Barshay: All right.

Mr. Hull: All right, I will do that.

Q. If it were 1200 you would need approximately 118,000 pounds of sugar and if it were 2,000 gallons you would need 144,000 wouldn't you, for two months? A. You are assuming that I would use pure sugar in these products, Mr. Hull.

The Court: Well, what was your Baume? Is that what you call it?

The Witness: Baume.

The Court: What was your Baume?

The Witness: Well, the Baume had nothing to do with the sugar extenders, your Honor.

The Court: No, but it has to do with the amount of sugar in the syrup, hasn't it?

—436—

The Witness: Well, when you check the Baume, even after using extenders, Baume would show up the same, your Honor.

The Court: If you used extenders?

The Witness: Yes, sir.

Mr. Hull: I don't believe the Baume would enter into that, your Honor.

Q. What was the percentage that you calculated of sugar content? A. In what, Mr. Hull?

The Court: Sugar now, not sugar extenders, but

Q. In whatever you sold. A. It would vary, Mr. Hull.

Q. Between what? A. Well, the canteens used a very light syrup, around 29 Baume; we sold them as high as 41 Baume, 42 Baume.

Q. Well, what's the sugar content per gallon in that? A. Well, it will vary; it will vary from—

The Court: In 29 Baume what would it be?

The Witness: It would vary from 6 pounds down to 8-1/2, 9 pounds.

Q. Is six pounds the minimum? A. I think it is a little under six, Mr. Hull.

Q. And is that the minimum of sugar content of any syrup— A. Any sugar extenders, yes, sir.

Q. Wait a minute. Is six pounds of sugar per gallon the minimum sugar content of any syrup that you sold?

The Court: Sugar now, not sugar extenders, but

sugar.

The Witness: Your Honor, we made syrup with as low as one pound per gallon sugar content, as far as rationed sugar was concerned.

Q. How about your sales to these people (indicating)? A. The same thing applies to them, Mr. Hull. We do the same thing today.

Q. You sold them syrup with sugar content of one pound per gallon? A. That is correct.

Mr. Hull: I don't believe I have any other questions.

Redirect Examination by Mr. Barshay:

Q. Mr. Sealfon, you said here that the first time you knew about duplicate purchase orders was at this trial. Did you mean this trial or when the original proceedings started? A. The original trial.

Mr. Barshay: That's all, sir, that's all.

I offer in evidence, your Honor, D-5 for identification and D-6 for identification.

The Court: What are they?

Mr. Barshay: Those are the Government exhibits originally produced as filed by the Greenbergs with the ration board on February 3rd and 9th, 1943.

The Court: All right.

(Received and marked Exhibit D-5 and D-6.)

Mr. Barshay: I offer in evidence ration order No. 11, your Honor, which speaks of the July 1st, 1943, date.

Mr. Hull: Your Honor, I don't care whether it is marked as an exhibit or not, but I point out that it is a matter of law and is for the interpretation and instruction of the Court.

The Court: Well, let it be marked because it was used as a basis for the interpretation given by the Government witness. It can't hurt anyone.

Mr. Hull: I don't think it should be—

The Court: Mark it, mark it.

(Received and marked Exhibit D-16.)

Mr. Barshay: The defense rests.

The Court: Mr. Barshay.

(The Court conferred with counsel at side bar.)

The Court: Mr. Barshay, through inadvertence, said the defense rests. What he meant to say is that at this time he is not prepared to go forward with his evidence and desires to resume tomorrow morning when he will produce certain witnesses who are not here at this time.

Is that the fact, Mr. Barshay?

Mr. Barshay: Yes. There will be about five minutes of character testimony and then I shall rest.

The Court: But you are not resting now.

Mr. Barshay: That's right. Thank you, sir.

The Court: Mr. Hull, I think under those circumstances if you have any rebuttal you desire to produce you may do it now.

Mr. Hull: Your Honor, I prefer to do it tomorrow morning, if I may.

The Court: All right.

Mr. Hull: If I present any it will be very brief.

The Court: All right, that's your right, that's your right. There is nothing further now, then?

Mr. Barshay: Nothing; and there will be no further testimony other than I said.

The Court: Yes. Then ladies and gentlemen of the jury, this situation arises because of a failure to appreciate and apportion the time properly. No one is responsible particularly for it, but it gives you and incidentally me a little extra time for such other pursuits as we may care to indulge in. I assure you that I welcome it because I have other work to do. We will, therefore recess until ten o'clock tomorrow morning.

The jury will be excused first.

ADJOURNED to Wednesday, January 16, 1946, at ten o'clock A.M.

—440—

Newark, New Jersey, Wednesday, January 16, 1946.

(Trial resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: Mr. Hull, have you anything before I send for the jury?

Mr. Hull: No, sir.

The Court: Or Mr. Barshay, have you anything to discuss before I send for the jury?

Mr. Barshay: I may save a minute's time, your Honor. I have my requests and I would like to present them to you.

(Requests to charge are handed to the Court.)

The Court: Send for the jury, please.

(The jury resumed their seats in the jury box.)

HERMAN E. SPRIGADE, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Mr. Sprigade, what is your occupation? A. I am a real estate broker.

Q. Do you know the defendant Robert Sealfon? A. I do.

Q. And how long? A. Oh, approximately six years.

Q. And do you know other people that know him? A. I do.

Q. And have you had occasion to discuss his reputation for honesty? A. I have.

—441—

Q. And what is that reputation? A. Of the highest.

Cross Examination by Mr. Hull:

Q. Have you any personal knowledge of the facts of this case? A. None at all.

Mr. Hull: That is all.

RONALD HELLEN, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. What is your occupation? A. Assistant vice-president Manufacturers Trust Company.

Q. Do you know the defendant? A. I do.

Q. For how long? A. Since March, 1943.

Q. And do you know other people that know him? A. I do.

Q. Have you had occasion to discuss his reputation for integrity? A. I have.

Q. And what is that reputation? A. Excellent.

Mr. Barshay: That's all.

Ronald Hellen—for Defendant—Cross—Redirect
John M. Search—for Defendant—Direct

Cross Examination by Mr. Hull:

Q. Have you any personal knowledge of the facts of this case? A. No, sir.

Q. One other question, if I may. Your bank is the one where Mr. Sealfon has his account, is it? A. Yes, sir.

Q. Has he had a substantial account there for some time? A. Since March, 1943.

Q. The account has been substantial? A. Fairly substantial.

—442—

Redirect Examination by Mr. Barshay:

Q. Your bank, sir, has extended credit to Mr. Sealfon? A. We have, sir.

JOHN M. SEARCH, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. What is your occupation, sir? A. Executive in the corn products industry.

Q. Do you know the defendant Robert Sealfon? A. Yes, sir.

Q. For how long? A. Approximately five years.

Q. Do you know other people that know him? A. Yes.

Q. Have you discussed his reputation for honesty? A. I have.

Q. And what is that reputation? A. Excellent.

Cross Examination by Mr. Hull:

Q. Have you discussed his reputation recently with anybody? A. Pardon?

Q. Have you discussed his reputation with anybody recently? A. No, sir.

Q. Have you any personal knowledge of the facts of this case? A. No, sir.

Mr. Hull: That is all.

David N. Sugarman, called and sworn on behalf of the defendant, testified as follows:

—443—

Direct Examination by Mr. Barshay:

Q. Mr. Sugarman, what is your occupation, sir? A. I am an insurance broker.

Q. And do you know the defendant? A. I do.

Q. For how long? A. About ten years.

Q. And do you know other people that know him? A. I do.

Q. Have you had occasion to discuss his reputation for integrity? A. I have.

Q. And what is that reputation? A. Excellent.

Cross Examination by Mr. Hull:

Q. Does Mr. Sealfon buy insurance from you? A. He does.

Q. Has he for a long time? A. Well, for about ten years.

Q. Have you any personal knowledge of the facts of this case? A. I do not.

Mr. Hull: That's all.

Sol Lehman—for Defendant—Direct—Cross
Bernard Newman—for Defendant—Direct

SOL LEHMAN, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Your occupation? A. Wholesale cracker and biscuit business.

Q. And do you know the defendant? A. Yes, sir.

Q. For how long? A. About eleven years.

Q. Do you know other people that know him? A. Yes.

Q. Have you had occasion to discuss his reputation for

444

honesty? A. Yes.

Q. And what is that reputation? A. Excellent.

Cross Examination by Mr. Hull:

Q. Your firm does business, does it not, with Mr. Sealfon? A. No, sir.

Q. Does not. Have you any personal knowledge of the facts of this case? A. No, sir.

Mr. Hull: That's all.

BERNARD NEWMAN, called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Barshay:

Q. Your occupation, sir? A. I am a retail merchant.

Q. Do you know the defendant, Mr. Sealfon? A. Yes, sir.

Q. For how long? A. I have known him for more than twenty years.

Q. Do you know other people that know him? A. Yes, sir.

Q. Have you had occasion to discuss his reputation for honesty? A. Yes, sir.

Q. And what is that reputation? A. Excellent.

Cross Examination by Mr. Hull:

Q. Have you discussed his reputation with anybody recently? A. Yes.

Q. How recently? A. What is it?

Q. How lately, how recently? A. Oh, during the summer.

Q. Did you have any particular occasion for doing that?

—445—

A. Yes, sir.

Q. Did you discuss at that time with this person the facts of this case? A. Oh, no, sir.

Q. Did you know anything about this case? A. No, sir.

Q. Have you any personal knowledge of the facts of this case? A. None whatsoever.

Mr. Hull: That's all.

Mr. Barshay: Your Honor, just one exhibit, sir, that was overlooked. It is marked for identification; I should like to mark it in evidence, D-9 for identification, the checks of Mr. Frank Citron, sir.

(Received and marked Exhibit D-9.)

DEFENDANT RESTS.

Mr. Hull: At this time, in rebuttal, I shall offer in evidence Exhibit G-36 for identification.

The Court: What is that?

Mr. Hull: This is the application that Mr. Sealfon was questioned about on cross examination, with the letters attached that were referred to.

Mr. Barshay: No objection.

The Court: All right, it will be received.

(Received and marked Exhibit G-36.)

Mr. Hull: I also offer in evidence Exhibit G-35

—446—

for identification which is the R.315 application that was filed in December, 1942 by Sealfon.

Mr. Barshay: No objection.

The Court: All right, it may be received and marked.

(Received and marked Exhibit G-35.)

Mr. Hull: I should like now to read a small portion of one of these letters to the jury. This is the letter dated July 13, 1942, on the letterhead of Sero Syrup Company, Brooklyn, and the third paragraph reads as follows: "We are shipping these plants an approximate average weekly gallonage of 964 gallons per week. Basing our use of sugar on 6 pounds per gallon, we have arrived at the figure of 50,128

pounds for the two months period of July and August."

I also refer to Exhibit G-35 and I will read the answer that is given to the item #7 in this R-315 application: "Explain in detail the purposes for which the sugar is to be used. A. To replace sugar in syrups delivered for U. S. Navy use as certified by copy of attached letter, 133 gallons at 6 pounds per gallon. This amounts to 798 pounds."

Louis Brock, recalled on behalf of the Government, in rebuttal, testified as follows:

—447—

Direct Examination by Mr. Hull:

Q. Mr. Brock, do you have with you some papers that were received in connection with the Sealfon account in November, 1940? A. Yes. (Papers are handed to counsel.)

Q. Five. What are those papers? A. These are applications for sugar replacements signed by the United States Navy.

Q. Do the applications indicate in any way—

The Court: Whose applications are they?

The Witness: They are from us to Sero, the amount of syrup that was used in this Navy stock for Navy personnel.

Mr. Barshay: Is that subsequent to the date mentioned in the indictment?

The Witness: It is.

Mr. Barshay: I object, sir.

The Court: I will sustain the objection.

Mr. Hull: That's all, Mr. Brock.

WALTER F. HOWES, recalled on behalf of the Government, in rebuttal, testified as follows:

Direct Examination by Mr. Hull:

Q. Mr. Howes, have you calculated the amount of sugar that would be required to make up a gallonage of 1200 gallons of syrup? A. Yes, I have.

Q. What is the result and will you tell us the basis on which you figured it? A. 1200 gallons of syrup for a two

—448—

months period of 10,200 gallons would have a sugar equivalent at 6 pounds per gallon of 61,200 of sugar.

Q. How much sugar would be required if it were 2000 gallons per week for a two months period? A. On the same basis for the 2000 gallons for a two months period it would be the equivalent of 17,000 gallons at 6 pounds per gallon, an amount of 102,000 pounds of sugar content.

Q. How many weeks did you figure in a two months period in reaching that result? A. Eight and one-half weeks.

Mr. Hull: That's all.

Mr. Barshay: No questions.

IVY MILLAR, called and sworn on behalf of the Government, in rebuttal, testified as follows:

Direct Examination by Mr. Hull:

Q. Mrs. Millar, what is your occupation? A. A waiter.

Q. Whereabouts? A. Longchamps, 41st and Broadway.

Q. In New York City, is that right? How long have you occupied that position? A. In that store two years and two months.

Q. Two years and two months? A. Yes.

Mr. Hull: Mr. Murray Greenberg, will you stand up?

(Mr. Murray Greenberg rose.)

Q. Do you recognize that man? A. I do.

Q. Have you seen him at Longchamps Restaurant at 41st

—449—

and Broadway? A. I have.

Q. How many times? A. Quite a few times.

—450—

Q. Since you have been there? A. That's right.

Mr. Hull: May I ask Mr. Sealfon to stand up?

(The defendant Sealfon arose.)

Q. Have you seen that man there? A. I have.

Q. How many times? A. Very often.

Della McNeil—for Government—Rebuttal—Direct

Q. Are you able to say of your own recollection whether you have seen them there together? A. I couldn't say.
Q. You can't say that.

Mr. Hull: That's all.
Mr. Barshay: No questions.
Mr. Hull: Miss McNeil.

DELLA MCNEIL, called and sworn on behalf of the Government, testified as follows:

Direct Examination by Mr. Hull:

Q. Miss McNeil, what is your occupation? A. Waitress.
Q. Whereabouts? A. Longchamps.
Q. Which restaurant? A. 41st Street and Broadway.
Q. For how long? A. Two years and four months.

Mr. Hull: Mr. Greenberg, please stand up.

(Murray Greenberg arose.)

Q. Do you recognize that man? A. I do.
Q. Have you seen him at this restaurant at 41st and Broadway? A. Yes.
Q. How many times since you have been there? A. Quite often.

—451—

Mr. Hull: Mr. Sealfon.

(The defendant Sealfon arose.)

Q. Have you seen this man there? A. Yes, I have.

Q. How many times? A. Well, that I couldn't say.

Q. Well, has it been— A. But not as often as the other gentleman.

Q. All right. Have you any independent recollection of having seen them there together? A. No, I haven't.

Mr. Hull: That's all.

Mr. Barshay: No questions.

Mr. Hull: Mr. Murray Greenberg.

MURRAY GREENBERG, recalled.

Direct Examination by Mr. Hull:

Q. Mr. Greenberg, have you ever been at Longchamps Restaurant at 41st Street and Broadway except in the company of Mr. Robert Sealfon? A. No, sir.

Q. Did you visit Mr. Sealfon some time around or after September, 1944? A. No, sir.

The Court: Where, where?

Q. At the office of Rosen & Rosen, his accountants. A. I don't think so.

Q. Did you visit him at that office or any place else after you knew that the investigation had started in this case? A. I did, but that was much prior to September of 1944.

Q. When was it? A. It was in May.

Q. Of 19— A. May or June of 1944.

Q. I see. You knew then, did you, that there was an investigation? A. Yes, sir.

Q. Did you tell him on that occasion that you wanted $25,000 to try to fix the case? A. No, sir.

Q. What did you tell him, if anything, about that? A. When the investigation started I got in touch with Mr. Sealfon and I met him in the office of his accountants, Rosen & Rosen, and I told him that in view of the fact that an investigation had started it would most likely end up in that counsel would have to be engaged, probably at fairly high cost, and that in view of the fact that the both of us had participated in the scheme and the both of us had made a lot of money out of it, that it would only be fair for the both of us to share the expense.

Q. What did he say to you? A. No given amount was mentioned.

Q. What did he say— A. He wasn't a bit interested because, as he told me at that time, he was perfectly—he was covered; he wasn't interested in sharing any expenses.

Mr. Hull: That's all.

Cross Examination by Mr. Barshay:

Q. Mr. Greenberg, you did retain counsel, didn't you? A. Eventually I did, yes.

—453—

Q. Yes. How many lawyers did you retain all together? A. Well, with reference to what action?

Q. All your actions arising out of this—

The Court: We are not interested in that at all.

Q. In these actions. A. Which actions?

The Court: The actions that you discussed with Sealfon.

Mr. Barshay: With Sealfon.

The Court: Yes.

A. Two.

Q. Two in New Jersey? A. That's right.

Q. How many in New York? A. None in New York with reference to this.

Mr. Barshay: That's all.

Mr. Hull: That's all. We rest.

Mr. Barshay: Just two—

The Court: Just a minute. My recollection of your testimony is that you said that you paid two cents a pound on all of the sugar which was secured through the false invoices filed with that Lyndhurst board, that you paid two cents a pound to Sealfon and it amounted to a half million dollars.

The Witness: That's right, sir.

The Court: And that you paid that to him in cash directly.

The Witness: That's right, sir.

—454—

The Court: Is that right?

The Witness: Yes, sir.

The Court: All right.

(Witness excused.)

Mr. Barshay: Just sur-rebuttal on the strict point of rebuttal of Mr. Brock. Mr. Sealfon.

ROBERT SEALFON, recalled.

Direct Examination by Mr. Barshay:

Q. Mr. Sealfon, will you explain to this Court and jury how you were enabled to sell the amount of syrups totaling about 1200 to 2,000 per week as set forth in the letter? A. Yes, sir. At the time that I started selling the canteen account a quantity of syrups, I was advised, as I stated yesterday on the witness stand, by Mr. Collins, of Canteen, by B. W. Dyer & Company, and by my attorney, that they all thought that these were exempt agencies, and I continued giving the Canteen whatever syrup they needed—we never cut their orders, we gave them exactly anything they asked us for. When we were rejected by the OPA ration board for the applications, I was almost completely out of sugar—the fact of the matter is, if Mr. Hull would have brought all of the records he would have seen that. I went to the ration board and I asked them for an advance of sugar at that time, and according to their regulations they weren't allowed to advance any sugar and subsequently I was practically out of business, and that's when I started

using all these substitutes that I explained to the Court yesterday. We used all sugar extenders we could buy—

The Court: Well, were those sugar extenders used before or after you wrote the letter in which you said you used six pounds of sugar?

The Witness: Your Honor, we were using a small

amount before that, but we became quite large users, and that's how I managed to expand my business, even to this day.

The Court: Just answer my question.

Mr. Barshay: Just answer the question.

The Witness: And I also—

The Court: Just wait a minute.

The Witness: I am sorry, sir.

The Court: Answer my question. What's the date of that letter, Mr. Hull?

Mr. Hull: July 13, 1942.

The Court: July 13, 1942. Now, did you start using your sugar extenders before that letter was written or after that letter was written?

The Witness: In some items, sir, we used them before and we used quite a large amount immediately after that letter was written. And we also at that time purchased syrup from other syrup companies in order to cover our local accounts, and I purchased

from several syrup companies syrup at that time.

Q. Name them, Mr. Sealfon. A. The Tasty Syrup Company in East New York, and the Mylo Foods Company in Division Avenue, Brooklyn.

Q. Are they recorded in your books? A. Yes, sir, all my transactions are in my book.

Q. And the purchases that you made from these enabled you to suppiy the canteen as you set forth? A. Yes, sir.

Q. All right. Mr. Sealfon, you heard Mr. Greenberg speak of a conference at the office of Rosen & Rosen. A. Yes.

Q. Wherein he asked you to engage counsel mutually and share the expense. Was any such thing discussed? A. It is a deliberate lie, every word of it.

Cross Examination by Mr. Hull:

Q. You attached a number of letters to this July 13th letter, didn't you? A. Yes, I did.

Q. One is from the Automatic Canteen Company of Long Island. A. That's right.

Q. One from the canteen in New York, 304 East 23rd Street. A. Yes.

Q. Another from General Aircraft Corporation, is that correct? A. Right.

Q. Another from Edo Aircraft Corporation. A. Yes, sir.

Q. Another from Republic Aviation Corporation. A. Yes, sir.

—457—

Q. Another from Grumman Welfare Association. A. Yes, sir.

Q. Another from Liberty Aircraft Products Corporation. A. Yes, sir.

Q. Another from American Air Lines, Inc. A. Yes, sir.

Q. Another from Ranger Aircraft Engines. A. Yes, sir.

Q. And the last one here from Colgate Larson Aircraft Company. A. Yes, sir.

Q. Did the syrup that you had sold to any of those prior to the date of July 13, 1942 contain a sugar content of less than six pounds per gallon? A. Some of them may have.

Q. Then why did you tell the board that you needed six pounds a gallon? A. Because—.

Q. To fill those orders. A. Because that's what we needed to get replacements of sugar, Mr. Hull. When we make any replacement business we use strictly that syrup for replacement syrup. We ship it for that purpose, we make it for that purpose and we ship it for that purpose. It has never been any different. We have never asked for anything we are not entitled to.

Q. You were representing to the board that you needed six pounds of sugar per gallon of syrups to fill your orders with these people that I have named, didn't you? A. If they were exempt agencies, that is correct.

Q. As a matter of fact, you say now the sugar content of

syrup that you sold to some of them was less than that. A. That's right.

Q. All right.

The Court: Well, did it get down to one pound, as you testified yesterday?

The Witness: No, sir, no, sir, not in that business. It couldn't. It did immediately after that, your Honor, because we were almost out of business. In fact, for two weeks' time there we were in very bad shape as far as shipping merchandise was concerned.

The Court: Was that before you got in touch with Greenberg?

The Witness: Oh, considerably before, sir. That was the middle of '42.

The Court: Let me ask you: You say you had an account at Longchamps.

The Witness: Yes, sir.

The Court: You only went there once?

The Witness: I met Mr. Greenberg there only once, your Honor. The account was opened up, I think it was, in the middle of 1944.

The Court: How often did you visit there?

The Witness: When, your Honor?

The Court: Well, from 1943 on—or 1944, was it?

The Witness: The middle of 1944 is when I opened

—459—

the account. I think it was June, your Honor; June of 1944, that I opened the account.

The Court: And you were a frequent visitor there, were you?

The Witness: Not too frequent, your Honor.

The Court: Before that had you visited it frequently?

The Witness: Not very frequently, your Honor.

The Court: All right.

By Mr. Barshay:

Q. Taking your wife and family there? A. Yes, sir.
Q. And your lawyer had an office nearby? A. Yes, sir.
Q. What address? A. 1450—in the same building.
Q. What was his name? A. Philip Zieler.

Mr. Barshay: All right, that's all. Defendant rests, your Honor.

The Court: Ladies and gentlemen of the jury, you will now be excused for a few minutes so that we may determine whether or not any legal motions will be made.

(The jury withdrew.)

Mr. Barshay: The defendant respectfully moves this Court for a dismissal of the indictment and a directed verdict of not guilty on each and every ground heretofore previously set forth at every stage of the proceedings, and especially I stress the ground which we call res judicata, on the ground that the

—460—

matters at issue in this indictment were present upon the former conspiracy trial of this defendant, now in evidence, and that the issues were deemed there essentially material and relevant to the issues charged in this indictment.

The Court: And were adjudicated.

Mr. Barshay: And adjudicated in favor of the defendant, as evidenced by the certificate of acquittal now in evidence in this case; and on the further ground, sir, that now the prosecution has failed to establish the defendant's guilt beyond a reasonable doubt and that there is a reasonable doubt as a matter of law.

The Court: I shall deny your motion. You may

have an exception which will be noted on the record.

Mr. Barshay: Thank you.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
Sealed. U. S. D. J.]

The Court: Now, you have indicated that you would like to have two hours for summation.

Mr. Barshay: Approximately. It will be less, I am sure, your Honor.

The Court: All right. And Mr. Hull?

Mr. Hull: I don't believe I will take any more than an hour, but as far as limitation is concerned, I would like to have the same time.

—461—

The Court: Well, it is now a quarter past eleven.

Mr. Barshay: I will try to finish by one, your Honor; and I think—

The Court: No, I am just trying to figure. I don't want to break into your summation. I am committed to speak at the Lyons Club today at ten minutes before one. That would only give you an hour and a half. We could recess now until half past one; then you would have your full time without interruption.

Mr. Barshay: As you choose, sir.

The Court: No, it is as you choose.

Mr. Barshay: I am sorry.

The Court: But the only thing is, if you start now you will be limited to an hour and a half.

Mr. Barshay: I will finish then.

The Court: All right.

Mr. Barshay: I think your Honor has indicated you would like to finish the case today, if possible.

The Court: If possible.

Mr. Barshay: Yes. And I shall go along.

The Court: But I don't insist on that at all, because if you feel that it will hamper you in any way, I am perfectly willing to continue it over.

Mr. Barshay: I will go along, sir, in an hour and a half; I will do my very best.

—462—

The Court: All right, I will give you then five minutes to—

Mr. Barshay: Get ready.

The Court: Yes.

(At this point a short recess was taken.)

—463—

(Proceedings resumed in presence of the jury.)

(Mr. Barshay summed up on behalf of the defendant as follows:)

Mr. Barshay: With your Honor's permission, Madam Foreman, ladies and gentlemen of the jury, Mr. Hull and associates: First, your Honor, I should say that a grateful lawyer was highly appreciative of the eminently fair trial your Honor has accorded to the defendant and for the untold courtesies your Honor has given counsel and I appreciate them sincerely and from the bottom of my heart.

Mr. Hull and your associates, I compliment you for the painstaking manner in which you presented and prepared this case; and to you, ladies and gentlemen of the jury, I just want to say "Thank you" for the undivided attention. To say more may cause the accusation of flattery; that I do not intend to do. If at any time during this trial I trespassed upon your time or I taxed your patience, please do not charge that to my client, charge it to me. My client may not have been fortunate in the choice of an able lawyer, but with pride I say he was at least fortunate in the choice of a lawyer who is sincere in the preparation and the presentation of the case and in the belief in the government's failure to convince you beyond a reasonable doubt of his guilt.

—464—

I address you as "ladies and gentlemen;" in reality I could really call you, too, "Your Honor" because surrounding you, each of you, is an invisible robe. You are the judge, not of the law, you are the judge of the facts. You decide what the facts are; you decide which witnesses to believe, how much you shall believe them, if you believe them at all. You are a judge of the facts on pure questions of fact which you decide. You are my court of last resort, and it is important, whether you be a judge of the fact or a judge of the law, to decide this case, and I address this strictly to you and not to the Court,—according to the rule you have sworn that you will enforce in this case.

I prayed from the very second that I chose you, ladies and gentlemen, especially you ladies, that one thing should not creep into this case, the thought that it is so difficult for the housewife to get sugar. You may have stood in line; you may have done without sugar in your home; you may have found it difficult to entertain; and I prayed that that thought of your personal sacrifice, which of necessity you had to make, would not cause any prejudice in this case against the defendant, because we are not charged with the purchase of sugar. We are not. I shall tell you later exactly what we are charged

—465—

with, but it is not with the purchase of sugar.

Now, we chose you with rapidity but not with carelessness. You can look at a person sometimes, look at his face or her face, and from a question or two decide that that person will give me a square deal. That's all we are entitled to. This is a country of laws and not of men. No matter who he is, big or small, rich or poor, black or white, a person is entitled to the benefits of the laws of this land, as well as he must expect to suffer the consequences of the law. And if you decide that way, that is all Mr. Sealfon has a right to ask; that is all as his lawyer I am asking, a verdict which will be free of the slightest degree of prejudice for any reason whatsoever; and at the same time in utter fairness, as an officer of the Court, a verdict that shall be completely free of any sympathy for Mr. Sealfon. In other words,

to render a true verdict as fits the evidence in this case.

Now, what are the principles that you, ladies and gentlemen, swore you would uphold? They are worth repetition. I cannot minimize their importance because unless you give them life and meaning and force and put them into effect and apply them concretely, they are mere empty words. But his Honor shall tell you that an indictment is merely an accu-

—466—

sation, it means exactly that. The Grand Jury, a body of men and women, heard but one side of the case, only the Government's side with no explanation, with no lawyers, and then they voted an indictment or accusation; and by its very language it accused the defendant of the specific crimes mentioned therein. That's all it means. It isn't proof of guilt; it isn't suspicion of guilt; it isn't evidence of guilt. You must not proceed on the theory that where there is smoke there may be fire, because innocent men can and have been indicted, and the makers of our laws years and years and years ago foresaw that; and so they said, "An indictment is merely an accusation." It is just like a summons in a civil case. You ride along one day and you have a little accident, hardly any damage and practically no injury to the man in the other car with whom you collided; two or three days later a lawyer serves you with a summons and complaint, "I want $50,000 for injuries sustained by my client." You put your an-

swer in and he comes to court and you find he cannot prove $10 worth, if he comes to court at all. That's the meaning of an indictment; that brings the defendant to court to have his day in court, it is to give the defendant his day in court under the law of our land. Knowing the human frailty our forefathers in

framing the laws, perhaps having come to the conclusion that some people may think otherwise on the ground that where there is smoke there must be fire, created another very sound principle of law,—principles which were not easily obtained; principles for which men died and bled in years gone by, because those in authority then didn't give up their rights to the people so easily; they had to fight for every inch of them before we got our Bill of Rights, before the English got their Magna Charta; and so they said the second principle, when a man is indicted the law presumes him innocent of the charge for which he has been indicted. That is not a privilege; it isn't a license, it is a right; it is a legal right, a presumption of innocence which belongs to the defendant.

This very second, as I speak, an hour from now when Mr. Hull shall speak, in the afternoon when his Honor shall charge you, as each of you deliberate in your jury room, and until twelve of you have been convinced beyond a reasonable doubt that the Government has sustained its burden of proof, that presumption belongs to the defendant. It is evidence

in his favor; it is vital, it is forceful, it is living, if you give it the force which the law says you should.

What is the next principle of law? You have heard it and it bears repetition. The burden of proof

—468—

rests with the Government. It means exactly that. Our law-makers thought of those things; we distinguished our law from the Napoleonic code where a man had to prove himself innocent. In our law the Government accuses through the Grand Jury and the Government must prove through its prosecutor. The defendant need not prove his innocence; he need not explain a single accusation, he need not even take the stand, and if he doesn't the law says you may not draw any unfavorable inference or presumption against him by virtue of his failure thereof. Sealfon could have sat silently by, but he chose to submit himself to a cross examination concerning which we shall speak later. And so, until the Government sustains its proof by a measure which is the next principle I shall speak of, there is no case. And what is that next principle? The one that says the measure of proof, the measure by which you must be convinced as an individual juror, not as a group, as an individual juror, each exercising his or her independent judgment after logical, persuasive, reasonable argument with one another concerning the witnesses and the evidence, the measure of proof demanded by the law, not by me, is beyond a reasonable doubt. His Honor will explain the meaning of

that in greater detail and in great detail to you. I shall merely say from the lay point of view it means

—469—

exactly what it says. If there is a reason for doubt arising out of the evidence in the case it belongs to the defendant and the law demands that the jury give it to him. That's all it means. But an apt illustration is perhaps fitting. If perchance the measure of proof as required beyond a reasonable doubt were to be defined as a twelve inch ruler, then you cannot demand of the Government that it give you thirteen inches to the foot, but you dare not take less by one millionth of an inch, not one millionth of an inch. It is beyond a reasonable doubt, and if there is that doubt the law says you must acquit.

Now, I said you are the judges of the facts. You are also the judges of the credibility and the believeability of the witnesses. And what does that mean? Simple. You place yourself in the position of your everyday life and you are in business and a man comes to you and he seeks credit or wants a job or he wants a contract, he wants to do business with you. He wants credit. That is what a witness asks of you when he takes the stand. He raises his right hand and swears to tell the truth, and in your business life you judge him, you look at him, you see his speech, his manner, his conduct; you ask him some questions. In large concerns they fill out forms. A man asks you for credit in business, you say, "Have

—470—

you ever been bankrupt before?" "Yes." "Have you been bankrupt more than once?" "Yes." You say he is not a good risk; I don't want to do business with him.

The same thing with a man on the stand. You see his manner, his speech, his desire for revenge, his hope of reward. Why is it that he is giving such testimony? Who is he that he raises his right hand? Does he mean it, does he really swear to God to tell the truth or is it just a formality? Is he concealing or hiding anything from you? Who is he? That is what you ask yourselves here as you look at a witness. You say, "Him I won't believe even if he swears under oath; him I won't give credit; he has two bankruptcy petitions against him."

Now, bankruptcy doesn't only mean financial bankruptcy; a man can be morally bankrupt and unworthy of belief. That is what you saw on the stand, a moral bankrupt by the name of Greenberg, whose first name has now in my mind become Santa Claus, the giver-away of a half a million dollars, Santa Claus Greenberg. Concerning him I shall speak later, the man who took simple truths, conceded facts, and with only he and Sealfon present so distorted the facts, so built upon the truthful foundation such false facts that by the very nature of their telling—I didn't have to rip him apart, brick

—471—

by brick, stone by stone until they collapsed as rubble

at your feet, but they fell by themselves. He was a moral bankrupt, you have a right to consider.

He pleaded guilty, he said, to two indictments charging crimes against the United States, the very Government on whose behalf he now testifies. Oh, how proud he must have been to strut forth from the back of the courtroom; for a change Mr. Greenberg is called by the Government. Now he is on their side; now he is on their side. He spent several years in cheating and stealing to defraud it for his own benefit and now he is on their side. Mr. Hull called him. Yes, Mr. Hull did, but Mr. Hull didn't guarantee the truth of what Mr. Greenberg said. Mr. Hull didn't place a badge of honor and approval upon Mr. Greenberg; and you cannot borrow the name of the Government, the might and the majesty of the law in your own favor because after you plead guilty and are awaiting sentence of the Court and you pray and hope in your own mind that you will be able to say on the day of judgment when you shall be sentenced on both of those indictments, "I tried to help the Government; give me leniency, give me leniency."

Oh, I don't say anything has been promised him, I don't even intimate it, not even intimate it; but that doesn't mean that he isn't a common sense fellow

with a hope of reward in his mind at least to enable his lawyer on sentence day to say, "Tell the Judge; look what I did for the Government; look what I did."

I will tell you what he did, Santa Claus Greenberg,—in addition to the wicked crimes you confess, you committed a still greater crime of perjury, perjury on the stand; in the face of you ladies and gentlemen you defiled this temple of justice, Santa Claus Greenberg, the same way as you defiled your synagogue of which you became the vice-president, with the accent on the "vice". They didn't know who you were; there was no thorough searching of your background, and all the money that you gave wouldn't buy you peace of conscience for the falsehoods that you uttered on this very stand. You are drowning, you are hopelessly enmeshed; you are caught. There is no hope of escape. You pleaded guilty, and now you want to drag an innocent man with you, in the hope that on sentence day you may in your own mind ask for leniency.

Let those who are guilty plead guilty. Let those who maintain their innocence fight with their blood and their might and their main and their hearts to show twelve citizens, fair and square, who have no interest in the outcome of the case—let him fight for his life even though it is not his duty to do so under the law.

Now, what is the accusation? It is set forth in

this indictment. You cannot go beyond it, ladies and gentlemen. I beg of you, don't. I think his Honor will admonish you to that effect. Now, we are not charged with buying sugar. I said that. We are not charged with paying Doctors or Citron or deal-

ing with the National Biscuit, or we are not charged with depriving the Army. We are not charged with paying a finder's commission or not taking off a withholding tax; we are not charged with over the ceiling or black market; we are not charged with any of those things. Very clearly and succinctly in twelve counts, on twelve different dates between October of 1943 and April of 1944, I think, they say that at a ration board in Lyndhurst the defendants, Greenbergs, Fresh Grown and Robert Sealfon filed applications for the purpose of inducing the board to issue ration certificates. The same thing is charged twelve different times on twelve different dates. Now, that is all we are charged with.

—474—

Well, let's see. Did we file those? The board says no. That's the Government's witness. Nobody saw Sealfon at the board. Did we write them? Did we prepare them? Did we see them? No. That's the accusation in the indictment. Ah, but the District Attorney read two sections of the law. He proposed the second theory. It is obvious that we didn't do it ourselves, so he proceeds on the theory that we aided and abetted and counseled and advised the Greenbergs to do that. Of course, his Honor shall tell you that what the Greenbergs did by way of their admission of guilt is chargeable only to them. They plead guilty for themselves, both Greenbergs and the Fresh Grown, for their own acts. You are to draw no inference at all that because they pleaded guilty Mr. Sealfon is guilty, or even is suspected of being guilty.

And how does the Government propose to prove that we aided and abetted the Greenbergs? Through the form of a letter. There is no other way—through the form of a letter. That's plain. The aiding and abetting came about by the letter of March 3, 1943, which we admit we gave to the Greenbergs—a simple fact which the Greenbergs enlarged into a falsehood. But lo and behold, ladies and gentlemen, can you for a single second forget the testimony of the Government's witnesses that they never saw the letter of March 3, 1943, they never saw it, members of the

—475—

ration board, their clerks, until this court proceeding and investigation started; they never heard of the letter. For all purposes the letter need not have been in existence as far as the ration board is concerned. It wasn't used to induce them to part with replacement certificates which the Greenbergs were not entitled to. It wasn't used. It didn't influence them. They didn't see it. They didn't know of its existence.

Ah, but the cunning Greenberg! I will show you what a cunning mind and an experienced mind he has. He says, "I gave the letter to my brother Leo, who left to go to the ration board," in the prayer and hope that his brother Leo would take the stand and say, "I gave it to the ration board." Well, I wouldn't call Leo. That's natural. And the Government wouldn't call him either; the Government wouldn't call him either. Because the Government

knows the truth of every word of it by the members of the ration board and their clerk, that as far as this letter is concerned it played no part whatever. They merely relied on the false invoices that the Greenbergs filed with them.

The cunning Greenbergs who originated this letter kept it in their pocket knowing that some day their day of judgment with the Government will come and

they kept it as an insurance policy in their pocket.

He said, "to share the expense of counsel"—"to share the expense for counsel." Let each man hire the counsel he seeks, he wants. That's his right. And if you haven't any money to hire counsel, the Government will be glad to give you counsel. I myself have been many times assigned by the court to protect indigent defendants, and I accepted it with the same earnestness and zeal, irrespective of no fee. He says there was a talk for the sharing of expense of counsel, as though there was need for Greenberg to worry about counsel for Sealfon. Oh, no. There is only one version of that little bit, that's true. It was an attempted shake-down, that's all. One million for defense but not one cent for tribute, Mr. Greenberg! Sealfon wouldn't contribute one cent. That's why this is no longer a case to me, it is a cause; it is a cause of simple justice and truth and honesty, not a case; a cause for which a man would have a right to fight and die, if necessary. Because if Greenberg can take the stand

and give an exhibition like Santa Claus did, no man with whom Greenberg does business is safe. No Government official whom he meets, or agent whom he meets, is safe if it should crop up in the fertile mind of this perjurer that "if I can help myself, I will say I gave him a little money." I will speak

—477—

about that in a little while.

Now, the Government called seventeen witnesses to prove its case. Mr. Quick, the expert who testified that after July 1, 1943, the ration board, even though they didn't know it, had no right to issue those certificates—and it is important on this point. Who lived in Jersey nearby Rutherford who had business with the ration board? Who had a chance to judge the members thereof? Their carelessness, their being undermanned, their overlooking to check? They were the only ones who asked for replacement certificates. These two slick Greenbergs, who moved over in this tremendously large plant at Lyndhurst —they had occasion to size up that board, and they said, "Easy money, easy money." All you have to do is file a paper and you get ration certificates."

Why do I say that? *I* don't say that; the evidence says that.

Have they done it before? Sure. Have they? Sure. Have they tried it on a little bit, on a little scale, rather? Have they tried it a little bit? On February 3rd, on February 9th in these exhibits, in a different way they filed applications for replacements to some concerns who they now explain

rejected the stuff for export, and he mentioned some naval supply officer, in the invoice. Very cleverly

—478—

done, you see; very cleverly done. Leo Greenberg signs an application, puts some invoices down which are absolutely false in every word that they have written thereon at the time it was written. They knew it was rejected. They knew it was on a pier for shipping space, and it wasn't shipped. And so they say, "Well, we will try it. If we are caught we will say we didn't know. If we are caught we will say that shipping facilities were bad, or they have been rejected."

But they weren't caught. Nobody checks, nobody cared; nobody cared. So the ration board issued certificates on February 2d, February 2d, February 2d, 19,000 pounds, 33,000, 1320 pounds. "Easy money," said those conniving Greenbergs. "Now we're in."

But they can't go too fast. Oh, this is not for imitation vanilla syrup; this is for jam. But it still entitles them to sugar replacement. They try again, and what do they get? No checking at all. Just filing a piece of paper. 4,000 pounds, 33,000 pounds, 75,000 pounds, 75,000 pounds—here it is. Now they are sailing. They took over that ration board and played it for H - - - and high water. They no longer needed a suggestion. Oh, they can enlarge upon it and use exempt agencies instead of export. But there was no need, there was no need to get such a suggestion from Sealfon. They knew their men.

—479—

They knew those three men who served their board didn't check; they didn't call up, they didn't ask for receipts, they didn't comply with the law, they didn't do anything. And so the Greenbergs took over. Now the next sucker that comes along they developed and they enlarge, and it is easy sailing for them. But they are so greedy, they are so greedy that even when they are cheating the Government—he takes checks made out to the corporation, cashes them, puts the money in his pocket, puts the money in his pocket, and he gives an explanation—the audacity of it to say, "Some of it I used for the purpose of the corporation and the rest of the money I used to give Sealfon."

Look what another lie that is! He says, "Sealfon gave unto him almost a million and a quarter in cash and he only returned a half a million." What did he need to cash checks for which belonged to the corporation, from other people? A half a million is less than a million and a quarter, isn't it? He didn't have to go to any outside source. But no liar can remember every lie he has ever told. Truth crushed to earth nevertheless shall rise, Santa Claus Greenberg. This is just one illustration.

Out of all the witnesses who testified, I should have wanted to call all of them if the Government didn't,

—480—

The case is Greenberg. The Government's agents testified to analyses, to examinations of books, but

the sum and substance very briefly of all their testimony is this: The Treasury Department agent, Mr. Wedel, took the stand and he said, "I was at his place. He showed me his books; everything I wanted I saw. Everything checked. Stubs, check books, records. Every penny bought from the Fresh Grown revealed itself in the records of Mr. Sealfon."

Do I need greater certification for the honor and integrity and the honesty of Sealfon than Mr. Wedel, the Government's witness? If the Government didn't call him, of necessity I would. My client testified that eight Government agents of various departments, OPA and everybody else, came. He made all efforts to cooperate with them, and signed affidavits for each and every one of them. And if there was one falsehood in those affidavits, when he took the stand he would have been ripped apart to the nth degree on the first and the littlest lie.

And so the case is Greenberg. Measure the man by the standards of which I spoke and you will find that if he came to you and asked for credit, you couldn't open that door fast enough to rid yourself not only of him but of the malodorous odor that he would leave in your place.

Mr. Greenberg, the first minute you took the stand,

—481—

Mr. Hull said to you, "What is your occupation in connection with the Fresh Grown Preserve Corporation?"

He said, "I am the president."

He knew he was the treasurer, didn't he? Why did he say, "I am the president and my brother is the vice president"? Mr. Hull didn't say, "Are you the president of the corporation?" and stop him. He said, "What is your office with this corporation?" Answer: "I am the president." He concealed from the jury in the hope that I wouldn't be able to find out or I didn't know, wouldn't take the trouble to find out, that he is also the treasurer. Oh, you think it is a little point. I will show you how significant it is. A treasurer knows something about his books. That's what a treasurer is for—books; treasurer of the funds—books. He doesn't have to keep them individually but he knows what's in them. On cross examination I elicited the fact that he was the treasurer. I will tell you why he didn't volunteer it himself. Did you ever hear of a man who was treasurer of a corporation that did any business as large as Mr. Greenberg who knew so little about the books, who saw them so little, who had so little to do with them and knew their content, it may be in a book, would reveal itself? That's why he said, "I am the president." He thought the point would slip my mind.

—482—

Did he conceal?

Well, Greenberg's coming on behalf of the Government is like the gentleman who evaded the draft throughout the entire war and when peace is declared he presents himself for enlistment in the United States Army. That's Mr. Greenberg.

As I say again, hopelessly enmeshed and cornered, he said that on December 11th for the first time, the day of his plea, he made a statement to the Government. Well, Mr. Greenberg, you told this jury the most outrageous lie that in twenty years at the bar I have ever heard, that in your lifetime you ladies and gentlemen have ever heard. While we are not charged with getting a half a million dollars, that point, that testimony, that extra piece of damaging testimony which he thought would crucify Mr. Sealfon, was the story of the half million. All the people in this court room, and I know not the business or income of any of them, wouldn't earn a half a million dollars in all our lives, and Greenberg gives it away, and he doesn't know where it went, in a little over a year. Mind you, I can give away a ten dollar tip to a waitress, I can give away twenty dollars, fifty dollars, several times during the year, a hundred, and not remember. Who can give away a half a million dollars and not know the time, the place? Who? And

why? You notice it took him, ladies and gentlemen, overnight—he finished his direct, he finished his cross, he told me he didn't know, he can't remember the dates, times and places, and overnight he must have said to himself, "Half a million dollars. I said I gave that back to Sealfon. That jury will never believe me." He can't given away a half million dollars without knowing anything about the times and places. Even $10,000 at one time is a lot of

money to carry around every week and give it away. He goes back and he tells you, "I did it at Longchamps, at Pappas, and in my automobile and in his automobile."

He takes truth and he builds falsehoods on it. But he can't get a witness to corroborate him, not even his brother, not even his brother, who I really thought would say, "Yes, I was there too." It took him overnight to think it over and come back to the District Attorney and say, "Oh, now I remember."

Well, he was at Longchamps. He was at Pappas. We admit that. We gave you an explanation. Pappas is near the National Biscuit, the same street, a block and a half or two away—a reason for it. National Biscuit complained of the Baume; Greenberg was sent for. So many complaints. The Government brought that out. Longchamps is the place where my defendant has a charge account since 1944, subse-

quent to the starting of this investigation.

"Oh, I had dinner with him in Longchamps once."

Well, I don't deny that Greenberg was in Longchamps more than once. He could have been there every day and known to those waitresses. Sure. But look at the cunning of him, and thank God, thank God that the Government in fairness called waitresses who were decent and honest. They saw Greenberg—perfectly plausible. They saw Sealfon—perfectly plausible. They never saw them together. Greenberg couldn't get any corroboration.

But look at the cunning of this Greenberg with respect to that half a million dollar story. This very fair Court said to Mr. Greenberg, when he volunteered that it was, "sometime in my automobile and sometime in his," then he volunteered, "You see, the idea was to have as few people present as possible," the Judge very fairly promptly said to him, "Why, Longchamps is full of people during the lunch hour."

That's what he testified to on the stand a few minutes before. Caught in the trap of the Court. The Court didn't attempt to trap him; the Court intended to elicit the truth. Then he switches; he says, "Oh, that was late in the afternoon; after two or three, it thins out."

—485—

See the cunning mind of Greenberg, how quickly he worked? He said lunch, lunch, between twelve and two. He said that himself; I didn't bring that out. The Court calls it to his attention and he switches. "Oh, it was two or three or four."

I thought he was going to say when he got into Longchamps he came up and slipped him the money, counted it. He didn't think of that.

Now why should he give Mr. Sealfon a half a million dollars? He admitted himself there was no way for Sealfon to check up. He said, "If I told Sealfon that it was 12,000,000 pounds that I got, there was no way for him to know," there was no way for him to know how much he sold to Royal, to Baron, to anybody else; no way he could go to the ration board and check up and find out how many pounds they

issued certificates for. There wasn't a way in the world. There was no court in the world to which Sealfon could take Mr. Greenberg and sue for an accounting because it is an illegal transaction. Why should he give away a half million dollars? Why? I want to know why. Why should he have come so honorably to Mr. Sealfon that for things Sealfon would never know about, he would give him two cents a pound, a half million dollars? Well, I will tell you why. You have a right to draw this as a logical infer-

—486—

ence from the facts in this case. Greenberg knows there is a day of judgment coming, there is a day of settlement; there are some questions he must answer, because he filed in 1943 for '44, or vice versa, in '44 for '43-'44, the fiscal year, an income tax of $57,000. There will be some questions, I have a right to draw as a logical conclusion, irrefutable argument from the evidence in this case. $57,000. Why, they got a million and a quarter for ten million pounds from my client. They must have gotten at least one and a half times that much for the sale of the balance of the 25,000,000 pounds of sugar. In addition to that they had a basic quota of 2,000,000. How easy it is for Mr. Greenberg when that time comes to say, "I gave away a half million dollars to Mr. Sealfon. I am not taxable for that."

Isn't it fair argument? Isn't it logical? Isn't that the reason for telling this story? Isn't it? For an idea, for a letter which he never used, he would give

Mr. Sealfon a half million dollars? Or is the story I just told you bare truth, bare logic, bare honesty, show the motive, the revengeful attitude of Mr. Greenberg toward my client, or show the motive and the selfishness, why he would inculcate anybody? You have that as a logical answer.

Yes, to all your wicked crimes you added this crime

of perjury. This man gave him a million and a quarter and he had to work this way to get the half million dollars back because, he said, "that's the way Sealfon wanted it. Otherwise Citron would know it."

Well, how would Citron know it? Citron didn't get paid by the price per gallon. Citron testified he got paid for carting a barrel of syrup two and a half dollars a barrel. Whether Sealfon paid thirty dollars for it or ten cents, that isn't the way they figure their business. What would Citron care? And he got his $48,000 for cartage and for supervision. What does he care what Mr. Sealfon pays for the syrup? How would he know? What would it be his business?

Truth crushed to earth will nevertheless rise. Suppose Mr. Sealfon really was getting the half million dollars and he sent over a million and a quarter. If you don't trust him, you go over with Citron; if you don't want Citron to know—let's say his theory is right—after Citron pays him the full amount, you take him in a little office, you shut the door and you

say, "Greenberg, I just brought over twenty thousand for the gallonage. Ten is mine."

It's worth a trip from Brooklyn to Lyndhurst to get ten every week, isn't it?

—488—

Oh, Mr. Greenberg, you told another lie that sticks in your throat. You said, Mr. Greenberg, did you, that Sealfon wanted a cheaper rate, a cheaper rate? The first load was 65 cents; it was testified to, it is in evidence, certified check, 65 cents a gallon. That was January 15. You wanted a cheaper rate, did you, Mr. Sealfon, Mr. Greenberg says? All right, that's your part of the deal. Let's see what the contract says, drawn March 10, after the letter: 70 cents a gallon; read it. 70 cents a gallon, as God is my judge! 70 cents is more than 65 cents, Mr. Greenberg, you didn't plan on that, did you? Not only that, the evidence if you will look through it, shows that it becomes 80 cents and 90 cents and fluctuates back to 70 cents; but nevertheless you signed a contract in your own lawyer's office, Mr. Greenberg, that gave you the lie. A document doesn't lie, you cannot crush the truth. 70 cents, I can stress, is greater than 65 cents, just as a half a million is less than a million and a quarter.

Oh, Mr. Greenberg, if you are so honest as to give away half a million for something that there was no possibility to check or be sued for, then you are the r[illegible] honorable man in the world and you wouldn't be the kind of man who would commit an honesty of the greatest import to Sealfon and so many dishonest

—489—

acts with respect to the Government. Sealfon, I am glad to say, Greenberg does not accuse of putting a gun to him and saying, "You have got to do these things." So dishonorable with the Government which he knows has power to check and to punish, so trustworthy to Sealfon as to turn over half a million dollars to Sealfon for an idea that was no use, for an idea implanted in the minds of the Greenbergs long before.

Oh, Mr. Greenberg, did you see what your lawyer put in this? You told Sealfon the quota that you had; Sealfon denies it. Paragraph 6 and paragraph 7 of your lawyer's agreement, signed and executed by you: "If the sugar quota of the seller as at present granted by the United States or its agencies or boards is reduced, the seller may reduce the weekly gallonage to be delivered. If the quota is cancelled then the contract is cancelled. Why didn't you set forth your quota therein if you say you told it orally to Mr. Sealfon? Why didn't you put that in? Because he didn't want Sealfon to know the quota in writing and he didn't want Sealfon to know the quota orally. Sealfon didn't ask; he was overwhelmed by the size and the activity of the plant, maybe foolish, maybe stupid—a lot of us do foolish things in retrospect which we say we wouldn't do again; business men do foolish things here and there; that doesn't mean we

—490—

are criminally inclined.

Oh, Mr. Greenberg, you didn't know Mr. Sealfon, did you, before January 15, 1943, and you say immediately thereafter you spoke to him, he came to you with a suggestion about a letter. Now, do you walk over to a man with whom you had only one or two deals, whom you never saw before,—do you walk over to him, don't know anything about him, and say, "I want to be partners with you in the commission of a crime; I have got an idea?" Why, how do I know whom I am talking to—apparently a big business man, big plant, apparently honorably run; is it normal to do those things to strangers? Is it? It defies common sense. No, Mr. Greenberg, you can swear on fifty Bibles, you can even fool the congregation and elect a new president, but common sense gives me a reasonable assurance that these ladies and gentlemen will not swallow such falsehoods as you uttered on the stand.

Now, let's get a little to talking about that letter. He says that Sealfon came to him and said, "I will write a letter leaving certain inferences. I have already talked to you that there was no need for it but let's see, at page 164,

"Q. —I asked of Greenberg on cross—'In other words, in the entire matter whether this letter or a letter similar thereto, you were the first one who

—491—

broached the subject.' A. That is correct."

So he was the first one who broached the subject in the entire matter; that means to Doctors or to Sealfon, whether this letter or the copy written a few days before.

Then you admit in your own mind you knew the purpose of the letter; otherwise you wouldn't have asked Doctors for the letter. What letter are you talking about, Greenberg? You were the first one to broach it. For what purpose did you have it in mind? You can't think quick enough, Mr. Greenberg, to extricate you from all the lies that swamp you and drown you beyond hope. He was the first one who suggested the letter. He sat a day and a half on the stand; he couldn't anticipate every question that was going to be asked. I don't claim any credit, it was simply truth as obvious to you as to me. He was the first one who suggested the letter.

Why? Why? Because he wanted to be the honorable man and assure himself that Sealfon isn't selling to bootleggers? Oh, no. I will tell you why he said that; he wanted that letter for insurance. He already took the ration board over, he took advantage of them, the big city fellows taking advantage of the

little folks over here in Lyndhurst, and it worked. Now they are going to enlarge their scheme. That is why you suggested about the letter; you, Mr. Greenberg; it never emanated from Sealfon. Maybe Sealfon was a fool to have written it and maybe he has paid a price for having written that letter; but as God is his judge, this letter as written is true, true in every respect. I only brought forth the agent from the Navy Yard and Mr. Brock because that is the only proof that the district attorney saw fit to pre-

sent. There was no need to mention the Republic Aircraft and the Sheepshead Bay Training Station. We did sell them just as this Mr. Fox says; there was a concession but the concession had nothing to do with the Navy Yard, the concession had nothing to do with the Navy Personnel, it had all to do with The Canteen. Mr. Sero delivered to The Canteen not one drop of Greenberg's syrup. We set that forth in the letter. We didn't say vanilla flavored syrup; it says "syrup" and the thought of Mr. Sealfon was this, the thought that he having acquired through the legitimate broker the National Biscuit Company, he was now in high heaven; he wasn't going to tell Greenberg about it, and the proof is that we sold them this stuff delivered to the Navy Yard, cherry, lime or coke; there it is, Sero Drinking Syrup from the very machines in the Brooklyn Navy Yard.

—493—

No, maybe on reflection Sealfon should have consulted a lawyer, should have made a searching investigation, should have asked questions, but I can understand it. I once read a story, very briefly, the substance of it is that a young girl fell in love with a very charming man and everybody knew about this man and his background but the little girl and the more people told her the more she should have seen with her own eyes, the less she believed until it was too late; she found out he was really a married man. It was too late, but that doesn't mean that when she first attached herself and was carried away by his charm and his manner and his speech and his

kindness and the entertainment and the presents and the gifts and his attentions, that doesn't mean that she knew of it. It doesn't mean that Sealfon knew of it either. He gets the National Biscuit Company —fine accomplices he chooses, doesn't he—Loft Candy Company, American Tobacco Company. I don't care how Mr. Greenberg kept his books and records or if he kept them at all or if he falsified or didn't keep them or what he did with his money. He wouldn't tell that to Mr. Sealfon, would he? He wouldn't tell that to Mr. Sealfon, would he? He would rather keep it away from Mr. Sealfon no matter what he did. How did Sealfon act? How did Sealfon act? I will tell you.

With great pride, I say, for twelve years up until

—494—

1940 I was an assistant district attorney in Kings County. I don't say that with conceit, I say that with great pride; and I was also an instructor of law at the Police Academy in the City of New York for some six years. I tell it to you to inform you that I had a great opportunity to observe criminal tactics, how they prepared plans, how they carry out crimes, how they conceal crimes, and with what purpose; to leave no trace, to avoid detection, to avoid being caught, to leave no fingerprints; to act in the dark, no cops could see them, no investigator should be able to follow them up. I didn't have to be an assistant district attorney to learn that. You folks know it yourself in your every day experience. I

am sure you do. Simple measure, simple standard; take it and apply it to Sealfon. Mind you, every penny given to Mr. Greenberg and to Fresh Grown recorded in his books in evidence, whether they were made by certified check, from his book; whether they were drawn to cash, cashed by him and delivered, in his books; whether made out to Citron, cashed at the bank by Citron, in his books; Citron signs a receipt for a purchase order, in his books; delivers the stuff, 98 per cent to the National Biscuit Company, gets a receipt from the National Biscuit Company, records the receipt in his books; bills the National Biscuit and receives the check; in his book. Use the

standard which I gave you by persons who make plans to consummate crime and seek to avoid detection. Why, any man who walked into Mr. Sealfon's place representing the United States Government, the OPA, price ceiling, income tax men, in one minute they may catch Greenberg. Maybe that's why you are for Mr. Greenberg. Maybe that's why Sealfon has nothing to regret. Yes, stupid,—he should have insisted on a receipt; he didn't tell Citron not to give a receipt; Citron says, "This man asked me to sign without a carbon copy." Sealfon says, "Don't do it again unless you sign a duplicate."

Yes, Mr. Greenberg, you upbraided Citron because there was 50 cents more coming to you. Sure it was coming to you, he had a right to ask for it. You are the same man without rhyme and reason that throws

away a half a million dollars. You wouldn't trust Citron with a $30 check and made him take it out of his own pocket before you let the load out. You, Mr. Greenberg, are the man who is giving away a half a million dollars.

Well, how did Mr. Sealfon act with respect to the application for replacement certificate that he made in 1942? Did he just present an invoice to this ration board? Oh, he did not; he attached letter after letter, letter after letter from the concerns with whom he

—496—

did business, in the hope that in the maze of regulations formulated by the OPA, nobody knowing in the early stages what was what and who was who—what business man hasn't at one time or another thrown up his hands and said, "My God, how can I comply with all the regulations and forms!" He knew it. There is one of the letters and Mr. Hull, I thank you for reading that, Mr. Collins wrote to Mr. Sealfon which Mr. Sealfon attached and put with the application for the ration board: "You have been delivering to the United States Navy, Brooklyn, New York—why didn't you tell them to change that?—excuse me, that is the end of the quote, "Brooklyn, New York."

Another letter: "As you undoubtedly know from your records you have been delivering to the United States Navy, Brooklyn, New York for our account about 500 gallons per week for the past four weeks. We expect a substantial increase in demand during

the next few weeks due to the additional personnel at the Yard and the warmer weather. Kindly make arrangements to take care of this additional business." Sealfon asked his broker, he asked the OPA, he asked business men. He tried and he failed. He tried again, he failed again. He had to appeal to Albany, he failed. By that time Sealfon knew that

—497—

you couldn't get replacement certificates. Because Collins wrote, "Brooklyn Navy Yard" does that mean that Collins committed a crime? Oh, in retrospect I say if I dictated the letter, in retrospect, not then, I would say, "I am selling to the Automatic employees in the Brooklyn Navy Yard, Flushing Avenue, Brooklyn, New York." That is in retrospect. But can you spell out a crime, criminal intent, willful knowledge that the law is going to be violated?

Look what Mr. Greenberg does with his application to another ration board whom he had a right to know by virtue of his residence nearby; an invoice. He had to get the idea, Brooklyn Navy Yard, in the invoice. Everybody knows there is a Brooklyn Navy Yard like the Philadelphia Navy Yard. Anybody knows that; you just put it in. Nobody checks you, you get your replacement certificate. For that you are going to give away a half a million dollars? Yes, Mr. Greenberg, you also told this jury, you did, when I asked you, "Did you know the Baron letter was false," you said, "Not until Baron pleaded guilty." Why, you knew long before that you have a right to

say from this evidence, Mr. Greenberg, because if you didn't know it was false, what was the need of you giving two cents a pound on the stuff sold to Baron, to Sealfon if it was legitimate and you didn't know it was false, you had a right to get replacement

—498—

certificates. I will tell you why you said it, Greenberg; you wanted this jury to know that Baron pleaded guilty. Again I say let those that are guilty plead guilty. We are not concerned with that at all but it is another indication of the cunning, Mr. Greenberg, that you possess, a picture of your criminal mind that cannot be revealed by an x-ray machine, but reveals itself by your loose tongue and your motives.

"What implication" the Court said to him, "did you intend to make," in words or substance,—I don't intend to quote exactly,—"when you filed these applications of February 9?" Well, the implication was to try to get the sugar whether he was entitled to it or not. It would take me far more time than that allotted to me, Mr. Greenberg, to go through your testimony and find lie upon lie, falsehood upon falsehood, perjury upon perjury. I don't think I need do it anymore. I have given each of you more than one reason for doubt; each of you need possess but one; the jury as a body need possess but one reasonable doubt that arises from the evidence. But I have impregnated the Government's case with reasonable doubts, all doubts, any doubts of any description at all. That is what I have done.

Then I called Mr. Sealfon to the stand and before that I shall take a few minutes to refer to another

—499—

witness who mentioned the name of Mr. Sealfon, a gentleman by the name of Doctors. The Government has not indicted him in this case. I take it that the Government's opinion was that he was free of criminality. He worked for Mr. Kraemer. We had nothing to do with Kraemer, nothing at all, but we know that he worked for Kraemer. Yes, but because f the scarcity of these products there grew up a so-called independent broker's finder's commission theory, "be glad to get the goods"—Greenberg, the seller, he had a right to pay Kraemer; we had no obligation to Kraemer. Sealfon was brought into this matter by young Doctors, his former friend, with whom he had no business before. Kraemer don't think we defrauded him up to this second because no claim was made upon Mr. Sealfon, and if Kraemer thinks young Doctors defrauded him, let Mr. Kraemer take Doctors to court. We shall be the best witness for him because we paid by check, we paid him when he was in this country, we paid him when he was in the Army on the other side; we paid him by sending checks to his wife. The fact that we did so to a friend by check is an indication that we refused and didn't want to conceal any transaction at all. There was no reason for it. When somebody told him that he ought to take off the withholding tax he called it to

—500—

the attention of Doctors. "You are no different from anybody else." Doctors said, "I will send you a letter that I am an independent broker." Well, maybe Doctors is going to be in the Army on the other side and wants his wife—because I think a soldier gets an extension for paying taxes—wants his wife to have this monthly allowance. What's wrong about that? What's so wrong about that? If he wanted to conceal it with a friend and if Greenberg's story is so true that we had so much cash, we would have given him $13,000 in cash and no one would have known anything about it; there was no witness, nobody would have known about it. If anything shows the integrity and honesty and good intentions of Mr. Sealfon, it is the fact that having consummated the sale, Doctors was entitled from his point of view, without depriving Kraemer in any respect. Let's say he was charitable, let's say he was friendly, let's say it was good business sense, which I say it is, but he recorded it in his book and now the day will come when Mr. Doctors will have to settle his just indebtedness to the Government.

Why should he get it for bringing together the people, you say? Well, salesmen, successful salesmen, the town is full of them, that bring about a meeting between A and B, all sales that come in during the entire time whether they participate

—501—

therein or not, the house for whom the salesman

works, if it is that kind of a deal, pays him a commission. If he is a salesman by himself he gets the commission. I can't understand the fuss made over that. Perhaps if I look at it in retrospect again I would say, "Maybe I would have asked some questions" but that doesn't mean I am dishonest; if I am I conceal my transaction, I don't record it. I have got a lot of money, I can conceal it; my friend comes over with me at the house some night; I slip him $13,000, that's the end of it. No, sir, not Mr. Sealfon. He built up an excellent business, he made an excellent contract with a reputable concern; he wasn't going to prejudice it for anybody, friend or not. I think he did the honest thing. If he did the foolish thing, made a bad mistake of judgment, that may be only seen in retrospect, but he never issued that letter for a criminal act of any kind and Greenberg says to Doctors, "You go and get the letter," and Doctors says on the stand, "I communicated the message" and I asked this question of Doctors, "Did Greenberg tell you to lie to Sealfon?" "No." "Did you lie to Sealfon?" "No." It is quite obvious that Greenberg wouldn't allow himself to get into the hands of Doctors, a young boy, or he wouldn't let Doctors know of any scheme he had in his own mind, no more than he would let Sealfon. That is Doctors' part in

the entire case. And Mr. Hull said, "As late as August, 1945, you got a check?" Well, it was coming to him. Because he was called to the Grand Jury,

you don't want to draw a wrong inference from that because Doctors was their witness. He could be called to the Grand Jury at a second's notice and if Sealfon ever tried to induce false testimony or color the testimony of Doctors you know the might and main and power of the Government, it would swoop down upon him and you would know it right here in front of you. The money was coming to him and he got it by check known and traceable to every agent of the United States Government. And so I called Mr. Fox, whose story is fresh in your mind and Mr. Brock, whose story is also fresh in your mind. When Mr. Brock was recalled for the purpose of showing that he couldn't have had, Sealfon couldn't have had the amount of sugar to make up the syrup, Mr. Sealfon came right back on the stand and made the honest explanation, "I got syrup elsewhere." He gave the name, gave the address, knowing full well that every word he says here can be checked by one, two, three, four, five, six agents and if he uttered a lie he would be checked like that and he would have to pay for it because he was under oath.

—504—

I offered Mr. Sealfon, born in a small town, educated in a small town, emigrated to New York in 1933 and started a business; never in trouble in life. This case has been investigated for over a year—

The Court: You have ten minutes more.

Mr. Barshay: Yes, your Honor, I am reaching the end. Thank you, sir.

Investigated for over a year. All the might and

main and power and manpower of the Government, all its resources, labored for the day that if Sealfon had to take the stand, they would show him up in his true light, if it was a wrong, wrong light, if there were any acts of moral turpitude, if he was ever in trouble before, if he had faults; if he had concealed assets, the Government can tie up vaults; the Government can do anything. A telephone call and you are frightened, and there comes a subpoena and you must come or the Marshal is at your place if you don't come.

"The mountain labored and brought forth a mouse."

Sealfon took that stand and submitted himself to a cross examination. What did the Government reveal as to his background? Did they show anything? No. As clean as a normal man of his age and business is ordinarily found to be. If not, you would know it; if not, you would know it. Nobody asked him on the

—505—

cross examination what was the income tax he paid. If it was wrong, you have a right to say they would know it, the same as I knew Greenberg's, and I am only a private citizen and I know it. They bring out everything—anything to destroy the credibility of Mr. Sealfon.

Now, if you had to give a job to Greenberg and you had to give a job to Sealfon, whom would you choose? Whom would you give credit to? Measure them by the same standard that I said you should

measure Mr. Greenberg by. His testimony is too fresh in my mind to go over it in detail. He revealed himself, like all human beings, with certain frailties, mistakes of judgment and cutting a little corner here and cutting a little corner there, but I say you say to yourselves, "If it were someone close to me, on all the evidence in the case, and all I wanted was that someone close to me to get a square deal and nothing else, would my conscience as a juror permit me to say I vote to find him guilty?"

Answer that in the silence of your own mind.

Invite me as a 13th juror in your box, not physically but in theory and in argument, and use some of the arguments, if they meet your approval; if they coincide with the testimony, if they bear out what I said, use, I pray you, some of those arguments on behalf of the defendant Sealfon in giving to him the fair trial that he is entitled to.

—506—

Ladies and gentlemen of the jury, there are two times in your lives when you are all important, all-powerful, when you need not make any apologies or explanations or excuses to a single soul, when you are more powerful than any human being on the face of the earth, when you can do as your conscience dictates. One is when you go in to the ballot box on election day and there in the august privacy of that little booth cast your ballot for whom you want, for whom you want, without dictation, suggestion, apologies, explanations to anyone; and the other time is when you are a juror and pass upon the guilt or

innocence of your fellow man. This is the other time. Think clearly, think courageously, act fearlessly, answer the question, "Has the Government established the guilt of the defendant beyond a reasonable doubt?" I don't suggest the answer but I call your attention to the fact that the evidence and exhibits and the lack of evidence and the kind of evidence that emanated from the Government shrieks to you twelve jurors to empower your foreman to say in answer to the Clerk, "Have you agreed upon a verdict?" "Yes, we find the defendant not guilty."

The Court: Ladies and gentlemen of the jury, we will recess now until a quarter before two at which

—507—

time you will return and counsel for the Government will sum up.

The jury will be excused first.

NOON RECESS

AFTERNOON SESSION

Mr. Hull: Judge Meaney, Mr. Barshay, ladies and gentlemen of the jury: In behalf of the United States Government I too wish to thank you for the time and attention which you have given to this case and at the same time I have no hesitation in complimenting Mr. Barshay for his work here at this trial.

By way of preliminary and before I begin my remarks, let me remind you that this is not a case of

Murray Greenberg against the United States. Greenberg has signed no complaint or filed any against Sealfon, although I couldn't help but wonder this morning whether Greenberg was on trial or Sealfon. The Grand Jury of the United States in this District returned an indictment against Sealfon and that's what you are here to try. You knew from the very beginning, before the testimony even began, that Greenberg had pleaded guilty, and the Government told you and tells you again that we do not rely upon that fact to support the case against Sealfon. It became my responsibility in presenting the case here to select the witnesses that would testify for

the Government, and I take the responsibility for that selection, and I tell you that the only thing you need to concern yourselves with as to Murray Greenberg is whether he was telling the truth here, and I will tell you later why the case does not stand or fall upon his testimony alone. It is fully supported.

And I also take full responsibility for not calling Leo Greenberg as a witness for the Government, just as Mr. Barshay has to accept the responsibility for not calling him as a defense witness, if he felt there was something he could say that would be favorable to him. And the reason I didn't call Leo Greenberg as a witness was because it was not necessary to do that in order to prove the Government's case. There is no doubt from the evidence that you have heard that Leo Greenberg took the applications and the

invoices to the ration board and filled out and signed every one of them and used the name in 596 of them that was contained in the letter of March the 3rd that Mr. Sealfon says he so casually wrote and delivered.

Let us consider, first of all, the position in which Sealfon found himself approaching the date of March the 3rd and March the 10th, 1943, and let us realize that he himself, as an industrial user of sugar, one who knew about basic quotas and knew about the

—509—

replacement program, because he tried it out, had a basic quota for the year of 1942 of 136,430 pounds and for the year of 1943, 189,707 pounds. Let us consider that he had this opportunity which he knew about in January or certainly in February of 1943 to sell a vast amount of syrup to the National Biscuit Company. That was certainly in his mind as the month of March approached. And let us remember that as an industrial user of sugar he knew that there were only two ways to get sugar that would go into that syrup: either from a basic quota or else from the replacement program which was inaugurated to protect the supply of sugar for the United States Army and the United States Navy. You realize, of course, without having it mentioned, that he couldn't get any exemption for delivery of sugar to the National Biscuit Company. In no sense was that an exempt agency.

Let us contemplate also that he knew that his own customers that he had sold syrup to, including the concessionaire at the Brooklyn Navy Yard, were not exempt agencies. I will say more about that later. Then he very casually, as he said, wrote out in longhand this letter of March the 3rd over at the office or the place of business of the Greenbergs and then he submitted it, as he said, to Murray Greenberg

—510—

to get his approval, and then later on he sent it to him, and the only thing I can get out of what Sealfon's explanation was is that it was intended to make Murray Greenberg happy. But how did it come? In a letter dated March the 10th, which also enclosed a contract dated March the 10th and that contract, ladies and gentlemen, called for nothing else but imitation vanilla syrup to the tune of 1200 gallons per week. That's what was to be delivered under this contract. And there you see the connection between the letter and the contract that existed in Sealfon's mind.

Greenberg testified, and bear in mind when I tell you about this that there is one point of evidence about this letter that is not contradicted in this case. Mr. Sanford Doctors, who was so close a friend of Sealfon's that he called him on the telephone and told him that he had been summoned to appear before the Grand Jury in New Jersey, that's how friendly he was, Mr. Sanford Doctors said that he went and told Sealfon that if the letter would be written, he

gave Murray Greenberg's message to Sealfon, that if the letter would be written he, Sealfon, would get syrup in larger quantity. On this witness stand Sealfon made no denial of that testimony and there is nobody to say that that isn't exactly what happened. You saw eighteen checks in evidence that

—511—

covered two two-month periods—one from January 15 to March 10, 1943, and the other from March 11 to May. 15, 1943, and you heard Mr. Howes, the accountant, tell you that there were eight of those checks in the first two-month period and ten of them in the second, and that the increase in volume of business in the second two-month period over the first was 120 percent. And from all the other evidence in this case that I will talk about further on you know that from then on all the sales increased tremendously, to the tune of over 9,000,000 pounds of sugar in the syrup that Sealfon obtained.

What happened after the letter was written? It was received on March the 11th, 1943, as it went out on March the 10th, and on March the 11th, 1943, the first invoice containing the name Brooklyn Navy Yard was filed with an application dated March the 11th, and the invoice dated back to January of the same year, and after that there were 56 applications, and all of these figures will include the specific counts, applications and invoices that are contained in the indictment; 56 applications were filed with invoices bearing the name Brooklyn Navy Yard.

596 times that name was used on invoices attached to those 56 applications. 131 certificates were issued by the local board on those applications, for a total sugar content of 21,727,855 pounds, all of which the

—512—

Greenbergs obtained from the refinery. Then syrup was sold and delivered, 98 percent of it, to the National Biscuit Company, none of it to exempt agencies, with a sugar content of 9,924,740 pounds, leaving a difference of 11,803,115 pounds.

—513—

Ladies and gentlemen, I told you at the outset of the case when I read the two particular statutes that were pertinent, that the indictment charged Sealfon with filing or causing to be filed these false invoices. I call your attention to the fact now that there is a specific provision in that statute making the causing of filing false invoices or false writings a violation and again I tell you that in addition to that there is the other aiding and abetting statute, and I say that under either one of those theories Greenberg violates the statute if the facts support the charge.

Let me talk for a minute about this two cents a gallon and then I am going to tell you about the idea as we have used it here. You have heard Mr. Greenberg referred to as Santa Claus Greenberg. I have no intentions of standing before you to justify or condone in any way the reprehensible part that Greenberg had in this case but just for one minute

I want you to look at these figures, and perhaps we might be able when we consider this to talk about Sealfon as Santa Claus Sealfon; because the first thing that he wants you to believe that he did was give this letter to Greenberg for no reason whatsoever. Does that make sense? If it were true he would be Santa Claus.

He would also be a Santa Claus for handing out

—514—

the payments that he did to the various other persons that you have heard about in this case. He received and you will see from this analysis that I have that it is not incredible that Sealfon would have wanted the two cents a gallon to make this deal, and that is what it was, worth while. He received from the National Biscuit Company $1,522,597.01. That is his figure that he gave you on this witness stand. He told you also that that included receipts for sales to the National Biscuit Company of products not obtained from the Fresh Grown Preserve Company. Out of that amount of money he paid the Fresh Grown Preserve Company $1,256,231.73, and when he tells you that it was remarkable that cash to the extent of $500,000 was delivered by Greenberg to him, that it is unbelievable, don't forget that Mr. Citron, who was a truck driver, carried over one million dollars in cash from Sealfon to Greenberg. Then he paid Sanford Doctors $12,732.05. Sanford Doctors' part in this case has been questioned in this respect by counsel in his summation. He wants to

impress you that the Government had not pressed any claim or any charge against Doctors and I tell you that that is no more a part of your consideration in this case than the penalty that the Greenbergs might receive. That penalty is solely and exclusively for Judge Meaney and there is no one here

—515—

to say that Judge Meaney is not capable of handling that, and it is not the function of this jury.

He paid the Dyer Company, his brokers, $32,326.94 and there again is a figure that included some other sales. I cannot help but wonder that if finder's fees were the order of the day and common among the trade, this particular type of trade, why the National Biscuit Company wasn't called upon to pay a finder's fee to Dyer Company instead of Sealfon having to pay them the commission that he did, $32,326.94. Citron and Kranski, the truckers, $48,824.91, another large amount that Sealfon paid out, and it wasn't all for trucking; it was partly for supervision. And if Mr. Robert Sealfon was fooled so badly by the Greenbergs in this case, why did he go into it so extensively as to engage the exclusive services practically of Citron and Kranski and have them in the plant there, one of them all the time, and have them working sixteen hours a day on something that he was led into and cajoled into by the smart and slippery Murray Greenberg, as he said. Sealfon knew what he was doing. The McCormack Truck-

ing Company, $15,093.07. They had to come into it because the quantity of syrup being delivered around January and from then on in 1944 was so vast that Citron and Kranski could not handle it. Citron was

—516—

fooled so badly and tricked so badly by Greenberg that he had to get the additional help of the McCormack Trucking Company, a big trucking concern, to carry on all the business that he was doing, and then he paid $45,000 for barrels. And that grand total is $1,410,208.70; and as against the first figure that I gave you that would give Sealfon a profit of $112,388.31.

Now, you will remember that Mr. Sealfon wouldn't say what the percentage was of the business that was separate and apart from the Fresh Grown Preserve Company account that he was doing with the National Biscuit Company. I tried to get him to do that and he wouldn't and said he couldn't and so I have taken a figure that I think is completely favorable to his side in reaching a result that I am going to tell you now. I am conceding that 90 per cent of the business between Sealfon and the National Biscuit Company concerned the Fresh Grown Preserve Company products and that only the small part of 10 per cent involved any other account, and I have deducted just 10 per cent from the total receipts that Sealfon obtained from the National Biscuit Company. So instead of $1,522,579.01, I am going now to start with a figure of $1,370,337.31; that is 90 per

cent of the first figure. And then when you place against that the total amount of disbursements on

—517—

the part of Sealfon in handling the transactions with Fresh Grown Preserve Company you will reach the ultimate conclusion that he would lose $39,871.39; that is if only 10 per cent of Sealfon's business with National Biscuit Company was from other accounts, and it may very well have been more. If it were 10 per cent he would have suffered a $39,000 loss after all of these transactions were completed. Does that make sense? Doesn't that lend perfect credence to the two cent theory and testimony that exists in this case? Doesn't it stand every test of reason that Sealfon would not have gone through what he did here and suffered a loss, and doesn't it follow from the figures that I have given you that but for the two cents a pound that Greenberg said he gave to him there would have been a loss of $39,871.39.

Don't dismiss that lightly from your minds because it so happens that what Greenberg told you about paying Sealfon two cents a pound for all of the syrups that he got using the idea as he said that was proposed and inaugurated by Sealfon, he gave him two cents a pound for all of them. It is the only feature of Greenberg's testimony that is not corroborated in this case and I will show you why that is so later.

Now, let's talk about the idea. The defense sought

—518—

to overcome Greenberg's testimony when he said that Sealfon inaugurated the idea by introducing these two exhibits. The important thing for you, ladies and gentlemen, to appreciate and understand right at this point is what the idea was that Greenberg was talking about. Let's see first what the Fresh Grown Preserve Company had done before as disclosed by these exhibits. Mr. Barshay incidentally, in referring to these when he talked to you, read the total amount of sugar that is contained in all of the certificates attached to these papers, and I am going to remind you that the biggest majority of the invoices in these files were not false; the ones that related to the Colonial Stores, the American-African Export Company and the Pan-Continental Export Company were false and I don't care whether Greenberg on the stand wants to talk about inferences or not, the Fresh Grown Preserve Company had no right in filing these invoices on those three occasions that I have named to indicate that they were completed transactions when they weren't, and they had no right to use the rejected material that had been turned back from the lot of Quartermaster at New Orleans and then turn that over to the Colonial Stores or anybody else and afterwards tell the board that it had been delivered for foreign export, because that is what these invoices purported to say.

—519—

Neither did they have any right to tell the board that

the undelivered material in the case of the American-African Export Company and the Pan-Continental Export Company had been delivered, and that is what they did.

But what happened here in the case of these exhibits and these applications and invoices is not the same as what happened after Sealfon came into the picture. It is not the same plan or the same idea. It is not the idea that was used in furtherance of the transactions between Fresh Grown and Sealfon. They slipped these in and, of course, we all know that the Greenbergs would slip in anything because that is the way they were operating; they were in this for money just like Sealfon was, but they had a valid order in their possession, mind you. I have said it was undelivered but it was a valid order from the American-African Export Company and a valid order from the Pan-Continental Export Company awaiting delivery. I don't know whether it was ever delivered and I don't care. There was also in existence the product and the order that they had finally delivered to the Colonial Stores and they saw the chance and put that in in this way with the replacement certificate.

Now let's see what the idea was after it was developed. Think very carefully about what Doctors told Sealfon. This is to Sealfon's friend, Doctors,

—520—

testifying. He said, "I went and told Sealfon that Murray Greenberg wanted me to come to you and

to say that if you will write a letter containing the names of your customers and anybody else, any exempt agencies that you are dealing with, I can get more sugar, and then sell more syrup to you." Doctors went to Sealfon with that message and then the talk and planning took place between Murray Greenberg and Sealfon.

—521—

And Sealfon told Murray Greenberg, "I am not dealing with any exempt agencies, but I will write you a letter and in that letter I will make it appear as if I am."

There was nothing like that in any of these applications, and there was nothing like that in the message that Murray Greenberg gave to Sanford Doctors, because he said, "If you are dealing with any exempt agency, put that in."

No letter was ever used before in this way by the Fresh Grown Preserve Company.

And thereupon Sealfon wrote a letter, which is not a pattern of what Greenberg had done before, but bear this carefully in mind— it is an exact pattern of what Sealfon had done before. And here is the answer to that in this exhibit. He wrote a letter on July 13, 1942, and he said in that letter:

"We attach herewith application for additional sugars and wish to advise you that these sugars are used to manufacture products consumed exclusively in the Brooklyn Navy Yard and various defense plants throughout Brooklyn and Long Island."

Exactly the same pattern. And it was not true in 1942 that he was selling to anything but a concessionaire at the Brooklyn Navy Yard, any more than

—522—

it was true in 1943. And he attached to that letter on July 13, 1942, this other letter, all of them that are here but this one in particular because it is most significant, from the Canteen—you heard all about it from the witness stand. It is dated July 14, 1942, and addressed to Sero Syrup Company:

"Dear Sir: As you undoubtedly know from your records, you have been delivering to the United States Navy, Brooklyn, New York."

The United States Navy, Brooklyn, New York. That's what this letter said.

Just a little bit later, on July 22, 1942, after the application had been rejected, Sealfon wrote another letter. You know that he took an appeal from the rejection of this application when it first went in. It went to the State Director and further. And in this letter he said:

"We have, however, used our sugar very freely on the assumption that we could immediately replace same due to the fact that we were making delivery to defense plants and to the Brooklyn Navy Yard."

There it is again.

Let me ask you now whether Sealfon or Greenberg conceived that plan, to file a false letter; and

if he were so casual about it when he was writing this

—523—

letter, why did he go on and add the last paragraph, which says:

"The total amount used by these plants varies from approximately 1200 gallons to 2,000 gallons per week."

Now, ladies and gentlemen, I say to you that you can't be naive enough to think that Sealfon was talking about what he might have done in the past with his own syrups. It is perfectly clear that he wanted to show in here,—no matter what language he used and in spite of the fact that he used the word "our" —what he was going to do with syrup that he got from Greenberg. But just for a moment, and in referring to the second part of the letter, let's see if that wasn't false as well as the first part. It is conceded by everybody, including Sealfon, that the first part was false because he didn't sell to the Brooklyn Navy Yard and didn't sell to any exempt agency, but his basic quota, and I am going to go back six months before the date of the letter, his basic quota for January and February 1943 was 18,165 pounds; for November and December 1942 it was 19,110 pounds; for September and October 1942 it was 39,410 pounds. The highest, and this one was double what the others were, the highest amount of sugar that he got from his ration board on his basic quota in any two-month period, going back six months before the letter, was 39,410 pounds.

—524—

Now, look at these figures carefully. He said here:

"The total amount used by these plants varies from approximately 1200 gallons to 2,000 galons per week."

In order for that to be true, he would have needed and required a basic quota double what his basic quota was; because on the basis of 1200 gallons he would have need 61,200 pounds of sugar for two months, figured at 8½ weeks, as Mr. Howes told you; and on the basis of 2,000 gallons per week, which was his maximum figure, he would have needed 102,000 pounds of sugar for the same two-month period. The most he had was 39,410 pounds. That paragraph in the letter couldn't have been true and nobody knew it better than Sealfon. He says he didn't know what the Greenbergs' basic quota was, but he certainly knew what his own was; and he knew he was lying when he wrote that letter and didn't care, because he was doing it for a purpose. He knew he was misrepresenting the nature of the agencies that he was dealing with, especially when he said Brooklyn Navy Yard, because he couldn't—not he couldn't—but he had never delivered to any exempt agency. That letter is false in two ways and one of them is enough to establish his criminal responsibility in this case.

Now, I want to talk for a few minutes about his

—525—

records. Mr. Barshay has seen fit to pay consider-

able attention in talking to you about the fact that Sealfon kept records and that they were open to inspection. He even talked about the failure of the Government to rebut something Sealfon said this morning on the witness stand, the very last thing that he said, about buying syrup from some other sources. That's the first time Sealfon ever said that, was this morning; and Mr. Barshay seemed to be surprised that the Government didn't call witnesses to rebut that. But talking again about his records, let me make this observation to you, and please consider it: Robert Sealfon couldn't hide over 9,000,000 pounds of sugar; nobody could. And that's what he got out of this deal for delivery to the National Biscuit Company; and Robert Sealfon and everybody else knew and had to know that the National Biscuit Company would keep accurate records. He couldn't conceal that sugar any place, and I think it would probably be within Mr. Barshay's experience in criminal law, and he certainly is well experienced, as he has told you, having been an assistant district attorney for twelve years and now being one of the leading criminal lawyers in New York—I am sure it is within his experience to contemplate that if something tangible exists in the perpetration of a crime that can't be hidden, such as the sugar in this

case, you do the next best thing and try to cover up by your records. Let's see what Sealfon did with his records. They started out in this deal, that's all it

was, by using certified checks. Perhaps I should more accurately say that in the first transactions that took place between the Fresh Grown Company and Sealfon, the transactions were covered by certified checks and by invoices prepared by the Greenbergs, which was the normal way of doing things. And then along came the letter and for a while, up until May 15th, the certified checks continued and then that was stopped; and you will see that this whole thing was unusual and extraordinary, as it developed. Then Sealfon began to make checks out to cash and went and cashed them himself and sent the cash over, and later on he began to make the checks out to Citron and let Citron cash them. Up until the time that the cash transactions started, invoices were issued by the Greenbergs, and they are here in one of these exhibits. And then all of a sudden and after a conversation, Mr. Barshay has argued that Sealfon was careless, that he was led into this thing, off his guard—he had a conference, he told you about that himself, with his accountants, about the deal, and then things changed. Then purchase orders were made out at Sealfon's place of business. And then a little later a letter was obtained from Doctors to say that he was a broker,

—527—

and I don't believe the story about this income withholding tax—even though Doctors said it I don't believe it. Doctors said that he proposed that; Sealfon said that he, Sealfon, proposed it. Don't forget

that. There is a little bit of variation there between the two friends. But the important thing that I want to tell you is that purchase orders were made out and the originals retained by Sealfon in his files. Now I am sure of my recollection that he admitted himself on this witness stand that that was unusual, that normally when purchase orders are made out in cash transactions where invoices aren't used, they are sent over to the other party to the transaction. But that didn't happen here. What did happen was Robert Sealfon kept the original purchase orders so that he would have grand records for anybody to to look at; because he couldn't hide 9,000,000 pounds of sugar; nobody could. He gave the duplicates and he wants now to say that he doesn't know what he gave the duplicates to Citron for; but Citron said, and Greenberg said, that no papers were delivered, duplicate purchase orders or anything else, by Citron when he went over there to get the syrup from Greenberg.

—528—

Now, ladies and gentlemen, if that isn't an irregularity in the keeping of records and an irregularity in the transaction from beginning to end, I don't know what is. And it occurs to me now to tell you that there is one piece of evidence that I have in my hand here that is going to show you that the irregular part of the deal was to relate exclusively to the transactions involving imitation vanilla syrup, because here in my hand I have a check dated June 10, 1943, and that is Robert Sealfon's check for $3474.

made out to Fresh Grown Preserves, Inc., and attached to that check is an invoice on the stationery of Fresh Grown Preserve Corporation, New Jersey, covering the item that is paid for by this check and consisting of 58 barrels of cola flavored syrup and 18 barrels of root beer flavored syrup. This, ladies and gentlemen, stands out as clear and conclusive proof that they were handling the transactions involving vanilla syrup in an irregular way and a way that was different from the normal procedure of business and different from the way in which other transactions between them were handled, and he cannot talk his way out of that.

I don't know whether—I mean to say I don't care whether Greenberg knew that this syrup was going to the National Biscuit Company. I don't think it makes much difference in the case except that point

—529—

has been made of it by the defense and in response I want to tell you that there was this evidence in this case and it is on page 375 of the transcript.

"What was the occasion and when, if you can recollect"—I will have to go back a little and this is referring, as Sealfon did, to his meeting with Greenberg at Pappas Restaurant, 14th Street and 7th Avenue in New York City and he said:

"How many times were you there?" This is his own lawyer questioning him. "How many times were you there?" and Sealfon said once. And then came the question: "What was the occasion and

when, if you can recollect?" and the answer, "Well, the exact time I couldn't place, but I know we were having some trouble with the Baume several times, from National Biscuit complaining, and I called Mr. Greenberg and I wanted particularly to have Mr. Citron there, and it was convenient to him because he was delivering syrup to the National Biscuit Company and that is why I picked the location.

"Q. Well, how far is the National Biscuit Company from Pappas? A. It is on 14th Street; it is about a block and a half.

"Q. Is that the reason? A. Yes, sir.

"Q. And did you have a talk with Mr. Greenberg about the complaints? A. Yes, sir."

He not only talks about complaints then but they had Kranski stationed over in Greenberg's place because complaints had been made and you cannot help but see through this picture and appreciate that everything that Sealfon did in writing the letter which was, of course, the principal feature of his aiding and abetting of Greenberg, everything he did was in furtherance of this opportunity that he had to sell syrup in tremendous quantities to the National Biscuit Company. And you look at the charts that Mr. Howes prepared; they are another exhibit there, and you will see that the sales jumped up tremendously, especially in 1944, but beginning right from the date of the letter they increased month after month; some months, of course, were lower than the month before, but they were all far and

away in advance of any transactions that existed before the letter was written.

Now, Greenberg has told you that he informed Mr. Sealfon of the system whereby the sugar was to be obtained. Sealfon himself had to know because of his experience as an industrial user, that that was the only way to get sugar that could go into the

syrup that he wanted. But Greenberg told him that they were going to make out these invoices and put the names on and the name was on; there is no gainsaying the fact that 596 times the name Brooklyn Navy Yard was used. And much has been made also by Mr. Barshay about the fact that Sealfon didn't get over to the Rutherford Ration Board or make any contact at all there. That wasn't part of the plan. I think that if Sealfon had gone there perhaps the supply would have been cut off. But at any rate there was no contemplation when they entered into the transaction that Sealfon was to go there. His part ended so far as the actual obtaining of the sugar was concerned, when the letter was written supplying the names, and began again when the syrup came to him and when the two cents a pound came to him. And it is of no help to the defendant to urge that the members of the board were in any way careless or indifferent in their treatment of these applications, because it is the law within the regulations that the board members, this local ration board had discretion as to the type of proof that

would be submitted. Mr. Quick told you that at first receipts had to be turned in of past deliveries but that changed so that the boards—and I think the change took place in September, 1942—so that the board could accept proof such as was offered and

—532—

that is what this board did; and it is of no avail to the defendant in this case either to say that General Order #11 changed the system on July 1, 1943. We have charged in the indictment the filing of false invoices for the purpose of defrauding the United States in the twelve instances referred to and we have established in the proof that that was done and that the proper exercise of that function according to the regulations was prevented.

You have listened very attentively and I am not going to talk anymore about the details of the evidence. I am going to point out to you eight reasons why Greenberg's testimony has full support. The first is in the testimony of Sanford Doctors, and I have talked about that.

The second is that the letter was written containing the name Brooklyn Navy Yard and Sealfon cannot talk his way out of writing that letter by the casual explanation that he has made to you.

The third is that Greenberg obtained 21,727,855 pounds of sugar, and we don't have that from Greenberg's testimony.

The fourth is that he sold Sealfon syrup with a sugar content of 9,924,740 pounds.

The fifth is that Sealfon paid out $153,976.97 in

—533—

expenses and Greenberg didn't testify to that, besides paying Greenberg $1,256,231.73.

The sixth item is that Sealfon obtained from Greenberg syrup with a sugar content far, far in excess of his basic quota, and I told you before that within his experience he had to know that that could only be done through the replacement program.

The seventh is that the transaction and his records were irregular with respect to the purchase orders and otherwise.

And the eighth is, and this goes back again to Doctors' testimony, that he was going to get sugar in larger quantities—Greenberg was going to—and sell syrup in larger quantities to Sealfon.

The eighth point that I make, and these are only eight among many, is that the sales increased tremendously after the letter was written.

Ladies and gentlemen, I am going to leave this case to you on the evidence. I told you in my opening that I was sure that the Government's proof would be overwhelming and conclusive beyond any reasonable doubt and I am equally certain of that at this moment. Bear in mind the profits that went to Sealfon; bear in mind all of the facts of the case; bear in mind that Sealfon and Greenberg along with him, both of them, were willing to perpetrate this

—534—

fraud upon the United States at a time when the United States was at war. And bear in mind that the sugar that they obtained in this illegal way came out of the supply that was preserved by the regulations under the replacement program for the United States Army and the United States Navy.

On the evidence I ask you to find this man guilty. I tell you that that is the only reasonable and logical verdict that you can come to.

The Court: We will recess now for five minutes.

(A five minute recess was taken.)

—535—

Charge of the Court

Ladies and gentlemen of the jury: The defendant Robert Sealfon has been indicted by a grand jury of the United States of America in and for the District of New Jersey on the charge of uttering false writings for the purpose of defrauding the United States. The indictment contains twelve counts, in each one of which there is set forth a separate writing which is alleged to be false and which was uttered for the purpose of defrauding the United States.

In the first place, I want to tell you this, and you must keep it in your minds throughout your deliberations. The mere fact that an indictment has been returned is in no wise to be considered by you as evidence against this defendant. It is simply the recital of a charge which is made against him and outlines the offense which the Grand Jury has returned as having been committed by him. It is not to be taken by you to have any probative value whatsoever. I trust that is clear. Sometimes, you know, people think that the old saying "Where there is smoke there is fire" applies to an indictment; that is not true at all. It is in no wise indicative of the performance of any wrong action on the part of this defendant; it simply frames the accusation made against him and has no value as proof.

—536—

The indictment charges that Sealfon uttered certain false writings for the purpose of defrauding the United States; and in that connection I shall read to you a statute which is pertinent in this issue:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids,

abets, counsels, commands, induces or procures its commission is a principal."

So that any person who aids and abets in the commission of a crime is deemed under this statute to be a principal.

The offense of uttering a false statement for the purpose of defrauding the United States is, of course, denounced as a crime; and what Congress deems to be an appropriate punishment has been provided for imposition in such cases as those in which persons shall be found guilty, after proper and due trial.

An aider and abettor is a person who, although not the direct perpetrator of a crime, yet does some act to render aid to the actual perpetrator thereof, or to abet the perpetration of the offense. Now, I have told you that this is a crime which has been denominated as uttering a false writing for the purpose of defrauding the United States. In this connection I will tell you that in order to establish an intent or purpose to defraud the United States within

the content of this statute, it is not necessary to show that the Government suffered a money loss or a property loss; it is enough to show that the act charged tends to impair or impede a governmental function or to frustrate the administration of a statute. So that if, under any contingency, the false instrument may be prejudicial, it is sufficient to form the basis of a conviction. In other words, the Government does not have to show that the United States lost some money by the execution of the offense charged or that it lost any property; it is sufficient to show

that it was impaired in one of its functions or impeded in the exercise of one of its functions.

You must keep in mind the nature of the offense charged and remember that it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt, all of the elements of the offense.

In considering this particular charge there are certain things which you must keep in mind. They are basic principles in our jurisprudence and they are of prime and significant importance. Under our system of law the defendant is assumed to be innocent until proven guilty beyond a reasonable doubt. This presumption of innocence is not an idle notion; it is an active protection which remains with the defendant throughout the whole course of the

—538—

trial. It constitutes a protection which can be taken from him only by your verdict, should you be satisfied from the evidence beyond a reasonable doubt of his guilt. The basis for this presumption is a sound one. In some jurisdictions the burden is cast upon the defendant affirmatively to prove his innocence; but that is a tyrannical and unfair burden. Therefore our Founding Fathers in building our system of law, determined that the fundamental principle of the presumption of innocence of the defendant should be guarded.

I have told you that this presumption can be taken from the defendant only should you be satisfied, beyond a reasonable doubt, of his guilt; and I will tell you now that the burden of proof of the guilt of the accused is upon the Government, and that burden never shifts; it never at any

time through the course of this trial becomes necessary for the defendant to prove himself innocent; and that is involved with the idea of the presumption of innocence; because you can very well see that it is easy to make a charge and it is sometimes impossible, and always difficult, affirmatively to prove innocence; and therefore there is no obligation on this defendant to prove himself innocent. The Government must prove him guilty beyond a reasonable doubt before you would be justified in returning a verdict of guilty.

—539—

I have used the term "reasonable doubt." That term, to an apprehensive mind, is self-explanatory. It means the doubt of a human mind functioning normally and rationally; a doubt which would be begotten in the mind of a juror from consideration of the evidence when his mind works as it does in the ordinary conduct of his daily life, with the appreciation and realization that one normally has. It has been defined as existing in that state of the case where the minds of the jurors cannot be said to have had an abiding conviction, to a moral certainty, of the truth of the charge. Unless you have such an abiding conviction to a moral certainty of the truth of the charge you may be said to have a reasonable doubt, and such reasonable doubt must be resolved in favor of the defendant.

But the defendant is entitled to the benefit only of a reasonable doubt and no other kind of doubt. He is not entitled to the benefit of a doubt which might be begotten in your minds because of your unwillingness to convict a fellow human being, no matter what the evidence; he is

not entitled to the benefit of a doubt based upon the fear that conceivably you might make a mistake. He is not entitled to the benefit of a whimsical, capricious, remote doubt; he is entitled to the benefit of a reasonable doubt, and if he get that, that is as much as he may properly ask

—540—

for and you may properly extend, so far as the question of reasonable doubt is concerned.

In this particular case there has been adduced evidence of the good reputation of the defendant; and I charge you that evidence of good reputation of itself is enough to beget a reasonable doubt, and if it should beget a reasonable doubt that doubt must be resolved in favor of the defendant. But I also tell you that evidence of good repute must be considered with all of the other evidence in the case, and may not be considered alone, separate and apart, without regard to other evidence; and certainly should not over-balance overwhelming evidence of the defendant's guilt. It must be weighed by you, but it must be weighed with all of the other evidence.

There has been testimony given by an accomplice. The accomplice was Greenberg; and I charge you that testimony of an accomplice must be carefully examined and accepted only after weighty consideration. It may, however, be the basis for a conviction, and while corroboration is very desirable, it is not indispensable or absolutely necessary. In the present case the alleged accomplice, who has pleaded guilty to this charge, has testified, and I tell you that you must weigh his testimony carefully and scru-

tinize it carefully. There would seem to me to be corroborative evidence from some of the other testimony in

—541—

the case and some of the other exhibits, but that is for you to determine.

Of course, in many cases the Government is in the position where it cannot choose its witnesses and must, of necessity, take those which are at hand, and sometimes those witnesses are not men of unimpeachable integrity; but that fact does not defeat the competence of their evidence, nor does it put you in a position where you must say that you will not believe it. This testimony you must weigh with all of the other testimony, and you will weigh it in accordance with the rule which I just gave you and the other rules which I shall pass on to you.

Mere suspicion or speculation in probabilities or possibilities may not be the basis for a conviction, because it would be manifestly unjust as well as unfair to suspect or guess a man into jail. You have evidence here before you and from that evidence you will determine where the truth lies, and from the comparison and consideration of all that evidence you will determine whether or not you think the Government has borne its burden of proving the guilt of the accused beyond a reasonable doubt; but you must not indulge in mere guesswork or speculation. The facts are here, and those facts you will weigh.

As a cognate proposition I will charge you that you may

—542—

not base a presumption upon another presumption, or an

inference on another inference. You may draw logical inferences from that which you find in the evidence to be a fact; but you may not draw another inference on that inference. Draw whatever inferences you do draw logically from the facts as you determine them from the evidence after you have compared and considered it.

You are the sole judges of the facts; you are the judges of the credibility which will be attached to any of the testimony or evidence adduced in this case; and it is for you to say whom you will believe or what testimony you will believe.

If, during the course of the trial, either counsel or the Court have attempted to retail any of the testimony, it is your recollection and not that of the Court or counsel which will prevail; because in the domain of establishing facts from the evidence you are the exclusive possessor of that right. It is a domain which may not be trespassed upon by anybody; you are the sole judges of the facts. You have the right to ask yourselves whether you believe that any particular witness testified truly and you have the right to judge from his demeanor whether it is the demeanor of a person telling the truth. All of those things which enter into the weight which will be given to any evidence

are for you alone. You may ask yourselves, in passing upon the question of the credibility of the witnesses or the weight to be given to their testimony, what interest, if any, any particular witness had in testifying as he or she did. You may ask yourselves, for instance, if hope of reward would lead Greenberg to testify as he did. Counsel in his

summation told you that he did not impute the giving of any promises to Greenberg, and that is a situation which you must keep in your minds; for a promise to have been given would mean that the Court participated in that in order for it to be effective, and that would be shockingly improper. But you may ask yourselves whether or not Greenberg had the hope of some reward for the action which he took, and whether that hope would lead him to lie.

You may also ask yourselves if any other witness who testified had any such interest in the outcome of this case as would lead that witness to lie or color his testimony. You may ask yourselves if the interest which Sealfon has in the outcome of this case, and he has a very vital interest in the outcome of it, would lead him to lie. From the conflict of the evidence we know somebody lied, and it is for you to determine where the falsehood lies and where the truth rests.

The evidence must be such as to exclude every reasonable hypothesis but that of guilt before you could return

—544—

a verdict of guilty; and if it does not exclude every reasonable hypothesis but innocence you may not find the defendant guilty.

I have told you that there is a conflict in the evidence and that is true, because there have been directly contradictory stories told. Only one, if either, can be true, or it may very well be that you will find that parts of each story are true, but you are to say that which is the truth and separate it from that which you deem to be the false.

Now, in this particular case Sealfon was engaged in the syrup business as a manufacturer and also as a general dealer. That business he carried on before he got in touch with Greenberg and previous to the time that he got in touch with Greenberg he made various attempts,—at least the evidence would indicate that,—to secure sugar to replace that which he says he believed to have been given to exempt agencies. Among those he included the Brooklyn Navy Yard, and in one of his applications before he met Greenberg he included a letter which, as I recall it, said, "You know you shipped syrup to the Navy at the Brooklyn Navy Yard." These representations were deemed by his own board not to be sufficient and he secured no replacements. Then, through an intermediary, a friend, he was put in touch with Greenberg and there is evidence that he

secured several shipments from Greenberg, and then comes the point of direct conflict. Something happened. And after that something which happened, Sealfon received syrup in very large quantities, syrup which, in the period contained in the indictment, necessitated the use of some nine million pounds of sugar. I don't recall that there is any evidence that he did not know that this amount of sugar was necessary for the production of the syrup, ninety percent of which he shipped to the National Biscuit Company; and in that discussion which was had between Greenberg and Sealfon is the crux of this situation. There are independent pieces of evidence which you must keep in mind, but the major evidence would seem to be concerned with what happened at the time when Sealfon found these

large shipments of syrup. And I want to say now, as I think I should, that counsel for the defense asked whether you would believe that Sealfon would pick out an accomplice like the National Biscuit Company. The National Biscuit Company does not enter into this question at all. You are not to ask yourselves whether or not the National Biscuit Company might have been mixed up in this and why isn't it in it or anything at all like that; you are not concerned with that, with the National Biscuit Company as a possible accomplice or anything else. You are concerned with the guilt or innocence of Sealfon.

—546—

The Government has introduced in evidence a letter and has brought before you the testimony of Greenberg which preceded the writing of the letter. It is for you to determine what is the truth of that whole situation. The fact is admitted that before the discussion and before the letter Sealfon received certain amounts of syrup from Greenberg, and that thereafter he received enormously increased amounts. These are elements which have been testified to and which you may use as a basis for drawing your inferences. There is a direct conflict in the testimony of Greenberg and Sealfon as to what happened about that letter. Sealfon gave an explanation which it is for you to determine whether it is reasonable or not, and which will also be of importance in your determination.

The whole picture must be viewed by you, not any particular small part of it, but the whole picture; and you must arrive at what your consciences tell you to be the truth in this whole situation.

I do not conceive that it would serve any particular purpose for me to dwell any further on the evidential situation, because you know that as freshly and as recently as I do, and you have the various points which were stressed by counsel for the defense and counsel for the Government. Your own recollection must guide and direct you.

—547—

During the course of the trial the Court made certain rulings on motions made by counsel. You are not to let any of the rulings which are made on objections or questions of law upset you in any way. Counsel for the defense is under the obligation to defend his client and to object to anything which he thinks contravenes or contradicts or trespasses upon the law, and if he is zealous in his defense, that, of course, must not be charged against him in any way; it is a reflection of his realization of his duty to his client.

When you go to the jury room, ladies and gentlemen of the jury, you are not to go there with closed minds; you are to keep your minds open, and you are to consult with your fellow-jurors. Discuss the evidence and then when you have discussed and considered the matter, you will arrive, each of you at your own individual determination, and that determination, of course, must be arrived at intelligently and conscientiously. And when you have so arrived at it, don't permit yourselves to be swayed by immaterial considerations. Let your conscience be your guide. Don't be pigheaded and stubborn and obstinate, and refuse to discuss questions, but when you have arrived conscientiously at a determination, stick to that unless logic causes you to change it and your consciences agree.

—548—

Now, it is almost needless for me to say that you must not be affected by any bias or sympathy or prejudice, because verdicts arrived at by prejudiced minds are dreadful things; verdicts arrived at as a result of bias are dreadful things; and verdicts arrived at out of sympathy are equally dreadful. You must remember you are not here as entirely sympathetic and emotional listeners, and you are certainly and definitely not here as prejudiced, biased listeners; you are here as jurors who are the peers of this defendant, as open-minded logical people, to hear the evidence as it is presented to you and then apply to that evidence the rules of law as I give them to you, after you determine the truth of that evidence.

You are to be courageous in determining the truth, not fearful, not timid lest you might make a mistake. The timid juror is an unworthy juror; all jurors must be brave and conscientious.

I said at the opening that the defendant was charged with uttering false writings for the purpose of defrauding the United States, and that, of course, must be knowingly and wilfully done, because knowledge and intent are certainly elements of the offense which is charged.

I have, in the course of the comments I made, said that Greenberg is an accomplice. That does not mean that

—549—

this defendant is presumed by me at any moment to be guilty, so that he would be effectively deemed guilty of this crime. Greenberg is an alleged accomplice, and I used the term simply so that you might be on your guard

as to the manner in which his testimony is to be regarded, but not to convey any imputation at all of the guilt of this accused; because although I may have my opinion, that does not matter; what my opinion is is not to affect you at all. I may have it, but even if you could read my mind, which you cannot, it must not weigh with you, because you are the judges of the facts, wholly, completely and entirely. What I think about this case, what anybody else thinks about it should not be of any concern to you.

Counsel for the defense has asked me to make certain charges and those which I do charge you will be charged with the same force and effect as the rest of my discussion with, or my directions to you.

The second I think I have covered.

The third I think I have covered.

The fourth I think I have covered.

The fifth, I will say this:

The witness Greenberg admitted on the stand that he had pleaded guilty to two charges made against him, and that you may consider in determining his credibility.

—550—

Also you make take into consideration other acts which he admitted from the stand which so pertain to his personal turpitude as to indicate moral depravity or degeneracy that would be likely to make him insensible to the obligations of an oath.

I will say that I do not recall any such admissions made by him, aside from his plea, but that you will keep in mind.

The sixth I think I have charged.

Mr. Barshay: Yes, your Honor.

The Court: The seventh I will charge as requested:

"Mere association or acquaintanceship of defendant, Sealfon and Greenberg in and of itself is no proof of the guilt of the defendant, Sealfon, of this charge."

The eighth I shall charge in this way:

If you have a reasonable doubt as to the guilt of the defendant, which doubt is based upon your disbelief of any of the testimony of any witness or your unwillingness to accept it as true, any such reasonable doubt, if it be begotten that way and be reasonable doubt, must be resolved in favor of the defendant.

The ninth I shall repeat:

"The defendant must be acquitted if the jury should entertain a reasonable doubt that this defendant did knowingly, wilfully and feloniously aid, abet or counsel

either Greenberg or Fresh Grown Preserve Corp. in the preparation or presentation of the false and fictitious documents." The statement being remembered that aiders and abettors, of course, are deemed to be principals.

The tenth I will charge in this way: If the jury has a reasonable doubt about the guilt of the accused based upon any determination which they may make about this particular letter, of course that will be resolved in favor of the defendant. I refuse to charge it otherwise.

I will charge the eleventh:

"In order to connect this defendant with the alleged crime, the jury must be satisfied beyond a reasonable doubt that such connection is established by the wilful and knowing act, conduct or declaration of this defendant only, independent of any declaration or acts of others."

In other words, he must stand only for his own acts.

The twelfth I think I have charged.

Mr. Barshay: You did, that's right.

The Court: Thirteen I have charged.

Fourteen—

Mr. Barshay: You charged that.

The Court: —I have charged. Fifteen I have charged.

Mr. Barshay: No,—I don't know whether you did,—I didn't check it off, fifteen.

—552—

The Court: The language that I used is this:

The evidence must be such as to exclude every reasonable hypothesis but that of guilt. If it does not exclude every reasonable hypothesis of innocence you may not find the defendant guilty. In other words, if the evidence is as consistent with innocence as with guilt, that situation must be resolved in favor of the defendant.

I think the sixteenth I have charged.

Mr. Barshay: That's right.

The Court: The seventeenth, I don't think it makes any difference.

Mr. Barshay: No.

The Court: The eighteenth I will charge:

The plea of guilty interposed by Greenberg and the Fresh Grown Preserve Corporation or anyone else in this case does not affect this defendant and must not be

considered by you as proof in any way of the guilt of this defendant.

Mr. Barshay: Will your Honor permit me just to record those two exceptions later?

The Court: Which two?

Mr. Barshay: No. 8 and No. 10.

The Court: Yes.

Mr. Barshay: Your Honor charged them in another way.

—553—

The Court: In other language and I refuse to charge them as requested, feeling that I have sufficiently covered them on the legal effect.

Now, ladies and gentlemen, you have paid great attention to this case which is a serious case. The statute which this defendant is charged with violating is one which has been passed for the protection of the people of the United States. In this particular instance it had ramifications which must not, because of their very pressing nature and grave importance in times of emergency, blind you to any truth in this situation. You must not let it affect you to prejudice you in any way. The factitious importance loaned to it by the times must not distort your minds; you must consider the evidence aside from the times in which we live and the rumors that are current, and just arrive at your determination according to the facts, applying to those facts the law as I have given it to you.

The violation of any criminal law is a serious and important thing. It is very serious for this defendant, because when a defendant is charged with a violation of law, with

a crime, it carries implications far beyond those of the immediate penalty involved, and that consideration should make every juror scrupulous in the fulfilment of his duty. You as a jury now represent for this defendant every

—554—

activity of Government at this moment, and he is entitled at your hands to the benefit of every protection that our American way of life provides for him. The Government of the United States does not ask for the sacrifice of anybody in order to prove its greatness; the Government of the United States realizes that an injustice performed by a jury in the return of a verdict of guilty is a direct threat to that government itself, because it is a breakdown in one of the prime functions of government. Therefore keep always in your mind the protection afforded to this defendant. But that does not mean that you must throw to the winds everything except regard for the defendant's rights, whether it be due or undue regard, because in this particular action there is another party besides Robert Sealfon. That party is the United States of America.

Now, the United States of America is not an entity remote and aloof from everything else; it is not just an artificial creation which exists separate and apart from our daily lives. The United States of America is you and I and one hundred and thirty-eight or one hundred and forty million other people who are banded together in a desire to live in peace and comity and under law. It is entitled to protection against assaults on it and on

—555—

its dignity and on its majesty. Unpunished crime, undiscovered crime, are threats to the logical, orderly processes of government without which we may not live in decency. Therefore while I bid you to keep in mind the rights of this defendant, I must perforce bid you to keep in mind the rights of the people of the United States.

The United States is a mighty, great organization, but it is only made up of units; this defendant, the jury, the Judge, everybody living in this country; and so we cannot arbitrarily say that this is a case of might against weakness. No, it is a case of the Government of the United States against Robert Sealfon, who is charged with the commission of a crime against the sovereignty of the United States, a crime against the people of the United States, and both of the parties to this suit are entitled to have their rights considered. The Government has its rights and demands of you that you do justice, no matter what happens, no matter where the chips may fall.

As I told you, it does not ask you to sacrifice anybody just to prove that it is great, but it does ask you to do impartial justice; and if you do not believe that the Government has borne its burden of proving the guilt of Robert Sealfon beyond a reasonable doubt, the Government of the United States itself asks you to return a verdict

—556—

of not guilty. If you believe that the Government has proven to your satisfaction beyond a reasonable doubt the guilt of this defendant Robert Sealfon, then it is incumbent upon you as citizens and jurors to return a verdict of guilty.

I have told you that you must be brave and courageous in your consideration, and that is true. You must not let anything sway you except the requirements of law and justice and right and truth.

I feel that I cannot say anything more to stress upon you the seriousness of the duty which lies upon you. You are called upon to strike a balance of truth, a balance of justice, a balance of right and that is a difficult task. It is never easy. Sometimes it is more difficult than others because of the importance, the gravity and the magnitude of the case, but that should all the more spur you to a determination to see the truth and to do justice.

I don't know that I can call your attention to that which is now your function in any better way than to recall to you the oath which you took, which was, "A true verdict to render according to the evidence, so help you God." And if you will do that really and truly, no one may quarrel with your verdict.

(The following proceedings took place at side bar.)

Mr. Barshay: I respectfully except to the Court's refusal

to charge in the language submitted Request No. 8, and the same with Request No. 10.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

Mr. Hull: There was one thing I was going to suggest—maybe I am too late. I think it is the law that an aider and abettor need not have full knowledge—

The Court: No, I won't charge that.

Mr. Hull: As to the exhibits, I think that the OPA regulations need not go into the jury room.

The Court: I will let them go in.

Mr. Barshay: I ask respectfully if the Court is permitting the record of the first trial, the indictment therein and the certificate of acquittal; the Court said no, to which I take a respectful exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY
U. S. D. J.]

Sealed.

The Court: You may swear the bailiffs. I would say this, ladies and gentlemen of the jury: The indictment contains twelve counts. You will consider each count separately, and a general verdict, if you should so arrive at it by unanimous agreement, of guilty,—just that alone,—will mean guilty of all. If there is any differentiation,

—558—

then you will examine—you will examine in any event each count, but if there is any differentiation in your verdict you will return a verdict separately as to each count. But if you return a verdict of guilty as charged it will mean guilty of all twelve counts and of course, a verdict of not guilty will mean a verdict of not guilty of all counts. I will now discharge the alternates with thanks.

Swear the bailiffs.

(The bailiffs were sworn.)

The Court: Anything further, gentlemen?
Mr. Barshay: No, your Honor.

(The jury retired at 4:02 p. m.)

—559—

REQUESTS TO CHARGE

1. In making the requests which I am about to make on the questions of law, when your Honor states to the jury that you so charge, that those particular requests become the law in this case with the same force and effect as if contained in your Honor's original charge.

2. A denial of the defendant's motion to dismiss the indictment and direct a verdict at the close of the Government's case and again at the close of the entire case, is simply a legal determination and means only that there are questions of fact, which in the Court's opinion, should be submitted to the jury for their consideration and determination.

3. It is incumbent upon counsel, in order to protect their client's rights, to make objections and take exceptions whenever counsel deems same necessary.

4. The testimony of Greenberg is not to be weighed or passed upon in the same manner as the testimony of other witnesses. His testimony must be weighed and scrutinized with care and with caution.

5. In considering the testimony of Greenberg, the jury must take into consideration not only his confessions of guilt made in open Court to this and another indictment for conspiracy to defraud and commit offenses against the

Government, for which he is awaiting sentence, but they may also consider any other acts of moral turpitude ad-

—560—

mitted by him on the witness stand.

6. In considering what weight, if any, they will give the testimony of Greenberg, they may take into consideration his interest in the outcome of the case, his motives in giving the testimony he did, and any hope of reward and consideration he entertains, and the jury may determine whether any of these matters induced him to give false testimony.

7. Mere association or acquaintanceship of defendant, Sealfon and Greenberg in and of itself is no proof of the guilt of the defendant, Sealfon, of this charge.

8. If the jury disbelieves the testimony of Greenberg, or have a reasonable doubt as to whether they should believe him or not, they must acquit the defendant.

9. The defendant must be acquitted if the jury should entertain a reasonable doubt that this defendant did knowingly, wilfully and feloniously aid, abet or counsel either Greenberg or Fresh Grown Preserve Corp. in the preparation or presentation of the false and fictitious documents.

10. If the jury should entertain a reasonable doubt that the letter subscribed by this defendant on March 3rd, 1943, was intended to defraud the United States Government in the performance of one of its administrative functions, then they must acquit the defendant.

—561—

11. In order to connect this defendant with the alleged crime, the jury must be satisfied beyond a reasonable doubt that such connection is established by the wilful and knowing act, conduct or declaration of this defendant only, independent of any declaration or acts of others.

12. The burden rests upon the Government to establish every essential element of the offense charged against this defendant, and every such essential element must be proven to a moral certainty and beyond a reasonable doubt. If any one of the essential elements of the offense is not proven to a moral certainty, and beyond a reasonable doubt, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any such essential element of the offense to a moral certainty and beyond a reasonable doubt, the jury must acquit the defendant.

13. Mere suspicion or even mere probabilities are not sufficient to warrant a conviction. Suspicion is not a substitute for proof. If the substantial testimony in the case merely establishes a train of suspicious circumstances or probabilities, the defendant must be acquitted.

14. The Court has no opinion and expresses no opinion as to the guilt or innocence of the defendant, and that if

—562—

during the trial the jury might have inferred, by reason of the Court's rulings or expressions, that he did possess such an opinion, they must exclude it from their minds.

15. If the jury believes that the evidence is consistent with innocence as well as guilt, the defendant must be acquitted.

16. If upon a consideration of all of the evidence, the jury entertains a reasonable doubt as to whether this defendant wilfully, knowingly and feloniously aided or abetted or agreed with Greenberg and Fresh Grown Preserve Corp., or either of them, then the defendant must be acquitted.

17. The jury must disregard the success of obtaining the sugar replacement certificates.

18. That the plea of guilty interposed by the Greenbergs and Fresh Grown Preserve Corp., or any one else, only affects them, and must not be considered by them as proof of the guilt of the defendant, Sealfon.

—563—

(At 9:10 P. M. the jurors resumed their seats in the jury box.)

The Court: Call the roll of the jury, please.

(The Clerk called the roll of the jury.)

The Clerk: Ladies and gentlemen of the jury, have you agreed upon your verdict? Who shall speak for you? Madam Forelady, how say you, do you find the defendant Robert Sealfon guilty or not guilty as he stands charged?

The Foreman: We find the defendant Robert Sealfon guilty as charged.

The Clerk: Harken unto your verdict as the Court shall order it recorded. You say you find the defendant Robert Sealfon guilty as charged and so say you all.

The Court: Very well, ladies and gentlemen of the jury. You understand, of course, do you, that a verdict of guilty as charged means, as I explained to you, guilty of every count in the indictment. Very well. You will now be excused until next Tuesday morning at ten o'clock.

We will recess until Mr. Calandra or the Probation Officer arrives.

(At 9:50 P. M. counsel for the Government and counsel for the defendant, including Mr. Anthony Calandra, appeared before the Court.)

The Court: Mr. Barshay, the United States Attorney

informs me that at this time the defendant Sealfon is paroled in his own recognizance and I have, in view of the verdict of the jury, decided to set bail in the sum of $5,000 to await sentence. In order that you may have an opportunity to secure bail I shall parole the defendant until tomorrow morning at eleven o'clock in Mr. Calandra's custody, Mr. Calandra being your New Jersey associate.

Mr. Calandra: I am glad to accept that responsibility. May I suggest, if your Honor please, that the time be fixed for 1:30, for the reason—

The Court: Two o'clock.

Mr. Calandra: —that Commissioner Bartholomew opens his sessions at 1:30.

The Court: Well, the Clerk could take it tomorrow morning. I would authorize the Clerk to take it; but at your convenience I will authorize the Clerk to do it in the morning or at two o'clock. You can arrange that with Mr. Barshay.

Mr. Barshay: Two o'clock.

Mr. Calandra: I think Mr. Barshay has a motion at this time, your Honor.

Mr. Barshay: I should like to make a motion, your Honor, to set aside the verdict. I understand that the practice here is that I must do so within three days after the verdict

—565—

and I want to preserve my right.

The Court: Well, if you want to make a motion now and state your reason, I would be glad to hear it.

Mr. Barshay: I move to set aside the verdict on all the grounds heretofore made during the trial, and on the further ground that it is contrary to law, contrary to the evidence and contrary to the weight of evidence.

The Court: I shall deny your motion. You may have an exception.

[Which exception is hereby allowed and sealed accordingly.

THOMAS F. MEANEY

Sealed. U. S. D. J.]

The Court: Anything further, gentlemen?

Mr. Barshay: That's all.

Mr. Calandra: Has your Honor fixed a date now for sentence?

The Court: No. Mr. Barshay has requested that I defer sentence for a while so that he may get a rest. He has tried two cases now within a short time and I am inclined to comply with that. How long a time would you want, Mr. Barshay, a month?

Mr. Barshay: A month will be all right.

The Court: No objection to that, is there?

Mr. Hull: No, sir.

The Court: Suppose we say—this is the 16th of Janu-

ary—suppose we say the 15th of February, Friday, the 15th of February.

Mr. Hull: Your Honor, we would be just as well satisfied if you deferred fixing a date at the present time.

The Court: Well, I will set the 15th and if there be any reason Mr. Barshay desires a further continuance he may make the application.

Mr. Barshay: Mr. Hull, will you want me here on the 22d on the other case or will you mark it off?

Mr. Hull: I can answer that by saying that the other case is now scheduled for February 19th and I will talk further to Mr. Barshay about that.

The Court: Suppose we set a tentative date for sentence on the 15th of February and you set a tentative date for the other trial on the 19th of February. Very well, it will be so ordered.

Sentence

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY

3522c

UNITED STATES OF AMERICA,

—v.—

FRESH GROWN PRESERVE CORP., MURRAY GREENBERG, LEO GREENBERG, AND S. J. BARON CORP.

3523c

UNITED STATES OF AMERICA,

—v.—

FRESH GROWN PRESERVE CORP., MURRAY GREENBERG, LEO GREENBERG, AND ROBERT SEALFON.

3502c

UNITED STATES OF AMERICA,

—v.—

FRESH GROWN PRESERVE CORP., MURRAY GREENBERG AND LEO GREENBERG.

Sentence

Newark, N. J., April 15, 1946.

Before:

HON. THOMAS F. MEANEY,

U. S. D. J.

APPEARANCES:

VINCENT E. HULL,
Assistant United States Attorney,
representing the Government.

GEORGE R. SOMMER, N. LOUIS PALADEAU, JR.,
representing the defendants Fresh Grown Preserve Corp., Murray Greenberg and Leo Greenberg.

ELIAS G. WILLMAN,
representing the defendant S. J. Baron Corp.

HYMAN BARSHAY,
representing the defendant Robert Sealfon.

—2—

Pursuant to Section 5A, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

(Sgd.) JOSEPH WICHMANN

Joseph Wichmann,
Court Reporter.

The Court: Fresh Grown Preserve Corp., Murray Greenberg, Leo Greenberg, and the S. J. Baron Corp.

Mr. Hull: Mr. Paladeau and Mr. Sommer appear for the corporation and for the Greenbergs. Mr. Willman appears for the S. J. Baron Corp.

The Court: The individuals Murray Greenberg and Leo Greenberg pleaded guilty to a charge of conspiracy to defraud the United States and the Fresh Grown Preserve Corp. and the S. J. Baron Corp. also pleaded guilty. No, that plea was—

Mr. Willman: *Nolo contendere.*

The Court: Because the effective head of the corporation had died.

Mr. Willman: Precisely.

The Court: And I permitted Mrs. Baron to come in as an officer of the company.

Mr. Willman: That's right.

The Court: And I made an exception to my own rule of allowing no pleas of *nolo contendere* because of that situation. She could not be expected to have known that which

was in the mind of her husband.

The sentence of the Court so far as S. J. Baron Corp. is concerned is that it pay a fine of $3,000.

The sentence of the Court so far as the Fresh Grown Preserve Corp. is concerned is that it pay a fine of $10,000.

Murray Greenberg, the sentence of the Court in your case is that you be committed to the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of

two years and that you pay a fine of $10,000. This is on the indictment for conspiracy, 3522c.

Leo Greenberg, the sentence of the Court in your case is that you be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of two years and that you pay a fine of $10,000.

On Indictment 3523c involving the Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg and Robert Sealfon.

Mr. Hull: May the record show that Mrs. Baron appeared in behalf of the S. J. Baron Corp.?

The Court: Yes.

The Fresh Grown Preserve Corp., Murray Greenberg and Leo Greenberg pleaded guilty to an indictment charging them with uttering false writing for the purpose of de-

—4—

frauding the United States Government, that indictment containing twelve counts. Robert Sealfon was tried and found guilty.

The sentence of the Court so far as the Fresh Grown Preserve Corp. is concerned is that it pay a fine of $1,000 on each count of the indictment, making a total of $12,000 on this indictment.

The sentence of the Court in the case of Murray Greenberg is that he be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of three years on each count of the indictment, each of these

sentences to run concurrently and to run concurrently with the sentence imposed on Indictment 3522c.

The sentence of the Court so far as Leo Greenberg is concerned is that he be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of three years on each count of the indictment, these sentences to run concurrently and to run concurrently with the sentence imposed on Indictment 3522c.

In addition Murray Greenberg and Leo Greenberg will be fined $1,000 on each count of this indictment.

I might say that these cases in which the Fresh Grown Preserve Corp. the Greenbergs and Sealfon are being sentenced, arose out of the filing of false writings and conspiracy in the case of the Greenbergs to defraud the Gov-

ernment which involved the securing of sugar. So far as the Greenbergs are concerned it amounted to twenty-five million pounds. So far as Sealfon is concerned I believe it was about a million and a half pounds. The unconscionable and illegal profits which were derived from that will certainly be taken care of by the Government because the tax plus the penalties imposed will practically consume all of it. So in no way could the fines, which are the limit, be construed as a license fee for anybody to mulct the public and defraud the Government. The Government will take care of the financial situation by fines and penalties in its other aspects aside from this criminal aspect.

I have, I believe, extended clemency. There may be disagreement with that idea, but I believe that I have ex-

tended clemency to the Greenbergs in a large measure and I have done that because the Greenbergs pleaded guilty and saved the Government the expense of their trials and in turn appeared as witnesses for the Government. I will say that had I been in the position of imposing sentence on the Greenbergs after a trial I would have imposed a sentence of ten years, and I am now imposing a maximum of three years feeling that they are entitled to recognition for their plea and the fact that their testimony was of value to the Government.

Robert Sealfon, you were found guilty after a trial. The sentence of the Court in your case is that you be placed in the custody of the Attorney General or his accredited rep-

—6—

resentative and by him be committed to an appropriate institution for a period of five years on each of the twelve counts of the indictment, the twelve sentences to run concurrently, and that you pay a fine of $1,000 on each count.

Indictment 3502c, involving the Fresh Grown Preserve Corp., Murray Greenberg and Leo Greenberg, the sentence of the Court so far as the Fresh Grown Preserve Corp. is concerned is that it pay a fine of $1,000 on each count of this indictment.

Murray Greenberg, the sentence of the Court in your case is that you be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of three years on each count of this indictment, these sentences to run concurrently and to run concurrently with

the sentences heretofore imposed on indictments 3522c and 3523c.

Leo Greenberg, the sentence of the Court in your case is that you be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of three years on each count of the indictment, these sentences to run concurrently with each other and with the sentences heretofore imposed on indictments 3522c and 3523c, and that you pay a fine of $1,000 on each count of the indictment, the same fine to be imposed on Murray Greenberg.

—7—

That takes care of that indictment, does it not?

My attention is called to the fact that Mr. Sealfon, instead of having been involved in the securing of a million and a half pounds, it was nine million and a half pounds.

Now, Mr. Barshay.

Mr. Barshay: I move this Court in arrest of judgment on the grounds heretofore urged before the trial, during the trial and after the trial.

The Court: You may so move, and I shall deny your motion and you may have an exception.

Mr. Barshay: Will your Honor permit me subsequent to calling the calendar apply for bail?

The Court: I will permit you now to apply for bail.

Mr. Barshay: I have the order and I have the grounds and so forth all ready, sir.

The Court: I understand that you are filing a notice of appeal.

Mr. Barshay: Yes.

The Court: Since I think that there is a debatable question involved, I shall admit him to bail. My practice ordinarily where I believe there is no question involved is not to admit them to bail. That does not mean that I think there is merit in your contention because if I did so think I should grant your motion, but I shall set bail in the sum of $10,000.

Mr. Barshay: Can your Honor possibly make it $5,000?

—8—

He was out on five.

The Court: I know he was, but five years is the sentence. I will discuss it with you later.

Mr. Sommer: If your Honor please, we made an application to your Honor in chambers so far as the surrender date was concerned in so far as the Greenbergs are concerned.

The Court: I wish you would hold the application, Mr. Sommer, until after I finish this list.

Mr. Sommer: Surely.

—9—

AFTER RECESS

The Court: I have Mr. Sommer and Judge Paladeau on an application.

Mr. Paladeau: We would like, sir, to renew our applications as to the surrender date in the Greenberg cases, and respectfully ask for a three weeks' postponement of the same.

Sentence

The Court: I have investigated the matter and in view of the fact that the compromise offer of $500,000, I believe it is,—isn't it?

Mr. Paladeau: $300,000.

The Court: $300,000, is in process of settlement and will require the presence of counsel and the defendants, I think that the request as made will be granted.

Mr. Paladeau: Thank you, sir.

The Court: I shall make the imposition of sentence as of this morning effective on three weeks from today. That will be on May 6th.

Mr. Paladeau: Thank you, sir.

The Court: I shall expect these men to be surrendered here without any further notice on May 6th.

Mr. Paladeau: Yes, sir.

Mr. Sommer: That is correct.

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Sur Indictment, etc. 3523C

UNITED STATES OF AMERICA,

Appellee,

—VS—

ROBERT SEALFON,

Defendant-Appellant.

Name and Address of Appellant:

Robert Sealfon, 185 Beach 148th Street, Neponsit, Long Island.

Name and address of Appellant's Attorneys:

Hyman Barshay, 26 Court Street, Brooklyn, New York, and Anthony A. Calandra, 31 Clinton Street, Newark, New Jersey.

Offense:

Defendant-appellant was convicted upon all counts of an indictment which charged a violation of Section 72, Title 18 of the United States Code, in that he defrauded an agency of the United States Government, by uttering and publishing as true certain false, forged, altered and counterfeit writings, for the purpose of defraud-

ing the said Government Agency, knowing the same to be false, forged, altered and counterfeited.

Date of Judgment:

Judgment was entered against the defendant-appellant on April 15, 1946.

Description of Judgment and Sentence:

On the First Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00.

On the Second Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Third Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Fourth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Fifth Count appellant was sentenced to be committed to the custody of the Attorney General of

the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Sixth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Seventh Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Eighth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Ninth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Tenth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Eleventh Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

On the Twelfth Count appellant was sentenced to be committed to the custody of the Attorney General of the United States and to be confined by him in a federal penitentiary for a period of five years and fine of $1000.00 concurrent with Count I.

Name of Prison Where Now Confined:

Defendant-appellant is presently in the custody of the United States Marshal for the District of New Jersey.

I, ROBERT SEALFON, do hereby appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment above mentioned, upon the grounds set forth below.

ROBERT SEALFON

Robert Sealfon
Defendant-Appellant

Grounds of Appeal

1. The learned trial court erred in failing to dismiss the indictment at the commencement of the trial, upon the ground that the issues presented by the indictment had already been determined adversely to the Government upon a former trial, thereby constituting the defense of res adjudicata.

2. The learned trial court erred in failing to dismiss the indictment at the commencement of the trial, upon the ground that the issues presented by the indictment had already been determined adversely to the Government upon a former trial, thereby constituting the defense of double jeopardy.

3. The learned trial court erred in the admission of testimony of various witnesses for the Government, over objections made thereto by the defendant-appellant.

4. The learned trial court erred in denying the defendant-appellant's motion for a dismissal of the indictment at the end of the Government's case, upon the grounds set forth in paragraphs "1" and "2" hereof, and upon all other grounds urged at the time the said motion was made.

5. The learned trial court erred in denying the defendant-appellant the right to comment to the members of the jury, in his summation, the fact of defendant-appellant's acquittal involving many of the same facts and circumstances as adduced in the instant trial.

6. The learned trial court erred in the charge to the jury.

Grounds of Appeal

7. The learned trial court erred in denying certain defendant-appellant's requests to charge.

8. The learned trial court erred in denying defendant-appellant's motion for a directed verdict of acquittal at the end of the entire case.

9. The judgment is contrary to law and to the Court's charge.

10. The learned trial court erred in denying defendant-appellant's motion for a new trial and in arrest of judgment.

HYMAN BARSHAY
ANTHONY A. CALANDRA
Attorneys for Defendant-Appellant.

Assignment of Errors

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SEALFON,

Defendant-Appellant.

Now comes Robert Sealfon, defendant-appellant, and says that in the record, proceedings and judgment aforesaid there is manifest error and for assignment thereof says:

1. That the issues presented by the evidence were identical to the issues presented, litigated and decided in a prior trial between the Government and defendant-appellant under an indictment charging him with conspiracy to commit the crimes alleged in the indictment at bar, which trial resulted in a judgment of acquittal, and that, therefore, the trial court committed reversible error in ruling throughout the trial as a matter of law that the prior judgment of acquittal was not res judicata of the issues again presented for determination.

2. That the trial court committed reversible in refusing to permit the defendant-appellant to present proof to the jury in support of his defense of res judicata, based upon the prior judgment acquitting him of the crime of conspiracy to commit the crimes alleged in the indictment at bar,

and to have the jury determine the validity of the defense as a question of fact.

3. That the trial court committed reversible error by denying the defendant-appellant the right to cross-examine the Government's witness, Murray Greenberg, a self-confessed accomplice, with respect to matters involving the witness' credibility and motives for testifying and that the restrictions imposed during the cross examination were unwarranted and contrary to law.

4. That the trial court committed reversible error in denying defendant-appellant's motion at the end of the Government's case to dismiss the indictment and direct a verdict of acquittal upon the ground that at all times mentioned in the indictment the Rutherford Ration Board admittedly had no authority to issue sugar replacement certificates.

5. That the trial court committed reversible error in denying defendant-appellant's motion at the end of the Government's case to dismiss the indictment and direct a verdict of acquittal upon the ground that the product purchased by the defendant-appellant was a non-rationed product and did not come within the purview of any regulation of the United States Government.

6. That the trial court committed reversible error in refusing to charge the jury as requested in Requests Nos. 8 and 10.

7. That the verdict of the jury and judgment of the Court is contrary to law and against the evidence.

Assignment of Errors

WHEREFORE, the defendant-appellant, Robert Sealfon, prays that the judgment herein, for the errors aforesaid in the record and all proceedings herein may be reversed and annulled and altogether held for nothing, and that he may be restored to all things he has lost by reason of said judgment.

Dated, July 8, 1946.

HYMAN BARSHAY,
HARRY GITTLESON,
ANTHONY A. CALANDRA,
Attorneys for Defendant-Appellant.

Stipulation as to Exhibits

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT SEALFON,

Defendant-Appellant.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the printing of the exhibits in the above entitled action be and the same hereby is dispensed with; and it is

FURTHER STIPULATED that on the argument of the appeal in the United States Circuit Court of Appeals for the Third Circuit, said exhibits may be presented to the court for its perusal with the same force and effect as if the same were originally printed at length in the record.

Dated, July 1, 1946.

EDGAR A. ROSSBACH,
U. S. Attorney,
Attorney for Appellee.

VINCENT E. HULL,
Asst. U. S. Attorney.

HYMAN BARSHAY,
HARRY GITTLESON,
ANTHONY A. CALANDRA,
Attorneys for Appellant.

[fol. 588] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9154

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT SEALFON, Defendant-Appellant

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 24th day of October A. D. 1946, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Biggs, Circuit Judge.

Endorsements: Order Assigning Hon. Albert Lee Stephens for Argument. Received & Filed Oct. 24, 1946. William P. Rowland, Clerk.

[fol. 589] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9154

UNITED STATES OF AMERICA, Appellee,

vs.

ROBERT SEALFON, Defendant-Appellant

And afterwards, to wit, 24th day of October 1946 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert Lee Stephens and Honorable Harry E. Kalodner, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 8th day of May 1947 come the parties aforesaid by their counsel aforesaid, and the

Court, now being fully advised in the premises, renders the following decision:

[fol. 590] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9154

UNITED STATES OF AMERICA, Appellee

v.

ROBERT SEALFON, Defendant-Appellant

On Appeal from Judgment of the District Court of the United States for the District of New Jersey

Argued October 24, 1946

Before Biggs, Albert Lee Stephens, and Kalodner, Circuit Judges

OPINION OF THE COURT—Filed May 8, 1947

By ALBERT LEE STEPHENS, Circuit Judge:

Robert Sealfon was convicted in the United States District Court of New Jersey for the crime of uttering and causing to be uttered forged invoices for the purpose of defrauding the government. He appeals from the judgment.

There were two indictments and two trials involving the appellant and arising out of the same transactions.

(1) An indictment was filed against the appellant, together with the Fresh Grown Preserve Corporation, [fol. 591] Murray Greenberg, Leo Greenberg, the S. J. Baron Corporation and others, for *conspiracy* to defraud the United States (18 U.S.C.A. § 88) and to commit offenses against the United States (18 U.S.C.A. §§ 72 and 80). The Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg and S. J. Baron Corporation pleaded guilty. A jury found appellant *not guilty*. (Other defendants not mentioned here were acquitted by direction of the court.)

(2) An indictment was filed against the appellant, together with Fresh Grown Preserve Corporation,

Murray Greenberg and Leo Greenberg, for uttering and causing to be uttered false and forged invoices for the purpose of defrauding the United States. The appellant was charged as a "principal", defined as one who *aids and abets* in the commission of a crime (18 U.S.C.A. § 550). All of the defendants, except Robert Sealfon, pleaded guilty. A jury found him *guilty*.

The appellant was tried on the indictments in the order we have them set forth. He raises the question whether the court in the second trial erred in rejecting his plea of *res judicata*, interposed on the basis of his former acquittal.

There is conclusive authority for the rule that where a conspiracy to commit a crime is charged as an offense, neither an acquittal nor a conviction of a *conspiracy* to commit the crime is *per se* a bar to a prosecution for the commission of the crime, or for *aiding and abetting* another to commit it. The two are distinct and separate crimes. Carter v. McClaughry (1902), 183 U. S. 365; Louie v. United States (Cir. 9, 1914), 218 Fed. 36; Bens v. United States (Cir. 2, 1920), 266 Fed. 152; and Curtis v. United States (Cir. 10, 1933), 67 Fed. 2d 943. On page 643 of the opinion in the very late case of Pinkerton v. United States (1945), 328 U. S. 640, appears the following: "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the [fol. 592] substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U. S. 354, 355-356; Gebardi v. United States, 287 U. S. 112, 121-122."

Wisely or not, the doctrine that the conspiracy fuses into and becomes one with the accomplished crime is not made the American rule. By operation of statute the "aider and abettor" of the commission of a crime is a principal in the crime, and is punishable as though he actually was the perpetrator of the crime. Title 18 U. S. C. A. § 550 provides "that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

In Pinkerton v. United States, supra, the Supreme Court upheld the conviction of a man on a substantive crime upon evidence that he had conspired with the actual perpetrator, and no evidence had been given that he had withdrawn from the conspiracy before the crime was committed. The theory was that since the conspiracy continued through the actual commission of the crime, "The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle." (Page 647.) [1]

The difference in the two cases is that in our case the defendant was acquitted in the conspiracy charge, and convicted on the substantive charge, not as the perpetrator but as an aider and abettor. In the Pinkerton case the [fol. 593] defendant was convicted on both charges; on the substantive, as in our case as an aider and abettor. But the difference does not affect the principles to be applied. The reason for sustaining both convictions in the Pinkerton case is that (borrowing an expression from the opinion) "The agreement to do an unlawful act is * * * distinct from the doing of the act." There the jury found every essential to a conspiracy present, as well as the fact that the overt act or acts in furtherance of the conspiracy aided the commission of the unlawful act. In our case the jury found something lacking in the evidence given in the attempt to convict the defendant of a conspiracy, but found the evidence given in the attempt to convict him of the sub-

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[1] On page 646 of the Pinkerton case, the court quoted from Hyde v. United States, 225 U. S. 347, 369. We repeat it here with a sentence of the court's which follows immediately. "As stated in that case, 'Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence.' Id., p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward."

stantive case sufficient to establish his aiding and abetting in its commission.

There is nothing significant in the fact that the evidence was substantially the same in the two trials of defendant. The very record of the first trial could have been introduced in the second trial under stipulation, and the case submitted upon it alone without violating the principle under discussion. Of course, this would not be true unless there were an ingredient of the one offense not found in the other, but in such a case there would be but one offense and the apparent difficulty fades out.

The principle applied in United States v. DeAngelo (Cir. 3, 1943), 138 Fed. 2d 466, which the appellant cites, has no application here. In that case it was thought that the defendant would have had to be "present" to have been found guilty in the first trial, and that issue was resolved in the negative. The same requirement was in the second trial, and the issue was resolved in the affirmative. The court reversed the verdict and judgment of conviction in the second trial because of a rule of evidence that a fact having once been judicially determined between the same parties cannot again be litigated. United States v. Oppenheimer (1916), 242 U. S. 85, 88. No such situation is present in our case. The two juries which tried appellant might [fol. 594] have found every word of testimony given them to be true, and yet have determined, as was their right, Morris v. United States (Cir. 9, 1946), 156 Fed. 2d 525, to find guilt or innocence in either without the slightest effect, one upon the other. Fall v. United States (App. D. C. 1931), 49 Fed. 2d 506, writ of certiorari denied in 283 U. S. 867; United States v. Carlisi (D. C. 1940), 32 F. Supp. 479; and United States v. Halbrook (D. C. 1941), 36 F. Supp. 345.

We briefly state the facts, which were substantially the same in both the Sealfon cases, in the margin.[2]

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[2] The appellant was engaged in selling syrup, and operated the Sero Syrup Company, a civilian business, within the Brooklyn Navy Yard. Murray and Leon Greenberg manufactured syrup, and were the president and vice-president, respectively, of the Fresh Grown Preserve Corporation. Under government regulations there were two ways to get sugar that would go into the syrup: (1) By obtaining a certain basic quota; and (2) by replenishment of the

[fol. 595] We find no error in the trial court's ruling on the res judicata plea, unless, as contended by the appellant, the matter should have been presented to the jury as a question of fact.

In support of the contention, three cases are cited, Edwards v. United States, 312 U. S. 473, 482; Short v. United States, 91 Fed. 2d 614, 618-619; and People v. Silverman, 281 N. Y. 457. None of these cases helps appellant.

The Edwards case is far afield. The other cited cases involve facts which give rise to the question whether two distinct conspiracies had been entered into by the respective defendants. They follow the rule set forth in 23 C. J. S. 623, § 1129 (former jeopardy), that "Where there is no dispute as to the facts, and the only question is whether accused has been in jeopardy, it is a question of law for the court. * * * Where, however, the plea is based on a mat-

[fol. 596] ter of fact which is shown by evidence outside the

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sugar obtained under the quota which had been used for a product delivered to "exempt agencies".

One Sanford J. Doctors, employed by Kraemer & Company (brokers), brought Murray Greenberg and Sealfon together. Some sales of syrup followed, and commissions therefor were paid to Kraemer & Company. Then, Doctors at the request of Murray Greenberg and because of the scarcity of sugar, approached Sealfon with the proposition that Sealfon should write a letter to Murray Greenberg to the effect that he sold syrups to exempt agencies in order that Greenberg could sell him more syrup.

Sealfon contacted Murray Greenberg regarding the matter, and Murray Greenberg testified that they prepared a draft of such a letter, inferring that Sealfon was selling to the Brooklyn Navy Yard. Murray Greenberg or his brother were to submit the necessary forms to the ration board, with invoices showing sales of syrup through the Sero Syrup Company for shipment to the Brooklyn Navy Yard, in order to secure replacements of sugar used for the amounts of syrup shown on the invoices. Sealfon was to have the syrup at a cheaper price in the form of a rebate of two cents a pound for sugar secured from the ration board.

The record discloses a contract between Sealfon and the Fresh Grown Preserve Corporation whereby the latter was to furnish Sealfon with imitation vanilla syrup, entered into at the office of Kraemer & Company and delivered to

record, the determination of the question of former jeopardy, or of the identity of the present offense with that charged on the former trial, is generally for the jury, and the court cannot overrule the plea because of facts within its own knowledge."

In our case the record of the former trial was before the court, showing the facts on its face, and the problem posed by appellant's plea of res judicata admitted of but one conclusion, as has been seen. It was, then, a question of law, and it follows that there was no error in the trial court's treatment of it as such.

Our attention is directed to certain instances with relation to the interrogation of Murray Greenberg, wherein the trial court excluded evidence over appellant's objections. The questions went to the credibility of Murray Greenberg

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the Greenbergs along with the following letter, addressed to the Fresh Grown Preserve Corporation:

> "DEAR SIRS:
>
> In regard to your request for information about our sales outlets we wish to advise you that at the present time some of our syrups are being sold at the Brooklyn Navy Yard, Republic Aircraft, General Aircraft, Sheepshead Bay Training Station, and various other defense plants throughout Long Island. The total amount used by these plants varies from approximately 1200 gallons to 2000 gallons per week.
>
> Very truly yours, Sero Syrup Company, by Robert Sealfon."

Testimony shows that syrups "sold at the Brooklyn Navy Yard" were in fact sold to a civilian agency located therein, and that the reference to "1200 gallons to 2000 gallons per week" was far in excess of Sealfon's basic quota for prior months.

The record shows other transactions by Sealfon wherein he attempted to secure replacements from the ration board.

Exhibits before the court include applications prepared for, and presented to, the ration board by Leo Greenberg, accompanied by invoices indicating deliveries to the "Brooklyn Navy Yard" by the Sero Syrup Company, the testimony showing, however, that such deliveries were made instead to a civilian concern, the National Biscuit Company.

as a witness. The appellant was claiming the answers to his interrogatory would support his claim that the witness testified falsely for the government with the hope of reward in a lighter sentence than he would otherwise get. The jury was fully instructed as to Greenberg's admission on the stand of his having pleaded guilty to two charges against him and of the fact of his being an accomplice. The jury was also instructed to consider Murray Greenberg's testimony in the light of his probable hope that the court would mete out a lighter sentence by reason of his testimony. The matter elicited was cumulative upon a subject not related to the details of the crime of which appellant was being tried and was within the discretion of the court.

The judgment will be affirmed.

A true Copy:

Teste: ——— Clerk of the United States Circuit Court of Appeals for the Third Circuit.

Sealfon paid Doctors over $10,000 as commissions on the syrup sold by Greenbergs to Sealfon. Doctors testified that the Kraemer & Company was paid commissions on sales made of syrup that came out of the Greenbergs' regular quota. Murray Greenberg testified that he paid Sealfon rebates as per their understanding. Truckmen, who picked up the syrup at the Greenberg plant for Sealfon for delivery to the National Biscuit Company, testified as to the change in handling transactions from checks to cash. In fact checks were made out by Sealfon to the truckmen, who in turn cashed the same, taking out their own fee and paying the Greenbergs then in currency for the particular load as it was picked up. The customary invoices were not used as to these transactions.

Replenishment certificates were issued upon the above false invoices by the ration board, and the transactions between the Greenbergs and Sealfon were thus carried out and continued for over a year.

The indictment for conspiracy (18 U. S. C. A. §§ 72 and 80) charged overt acts: that Robert Sealfon made a fraudulent application for the replacement of sugar, and delivered to the Fresh Grown Preserve Corporation the above quoted letter. In the instant case the identical invoices, the letter, the same testimony and exhibits were admitted into the evidence.

[fol. 597] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9154

UNITED STATES OF AMERICA, Appellee,

vs.

ROBERT SEALFON, Appellant

Present: Biggs, Albert Lee Stephens, and Kalodner, Circuit Judges.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court, Biggs, Circuit Judge.

May 8, 1947.

Endorsements: Order Affirming Judgment, Received & Filed, May 8, 1947. William P. Rowland, Clerk.

[fol. 598] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief (containing the portions of the record before the Court at argument) and proceedings in this court in the case of United States of America, Appellee, vs. Robert Sealfon, Defendant-Appellant, No 9154, on file, and now remaining among the records of said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 14th day of May in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States the one hundred and seventy-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal)

(831)

[fol. 598] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. —

ROBERT SEALFON, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon consideration of the application of counsel for the petitioner,

It is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 7, 1947.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 5th day of June, 1947.

[fol. 599] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 3 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 174

October Term, 1946.

ROBERT SEALFON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT T. McCRACKEN,
LEMUEL B. SCHOFIELD,
THOMAS D. McBRIDE,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CASES CITED.

	Page
Bailey v. Alabama, 219 U. S. 219, 31 S. Ct. 145	25
Baldwin v. Iowa State Travelling Men's Assn., 283 U. S. 522, 525, 51 S. Ct. 517	18
Brittain v. Kinnaird, 1 Brod. & B. 432, 129 Eng. Rep. 789, 4 J. B. Moore 50, Gow, N. P. 164, 21 Revised Rep. 680	18
Collins v. Loisel, 262 U. S. 426, 430, 43 S. Ct. 618	17
Coffey v. United States, 116 U. S. 436, 445 (446), 6 S. Ct. 437, 29 L. Ed. 684, 687	18
Com. v. Ellis, 160 Mass. 165, 35 N. E. 773	18
Com. v. Evans, 101 Mass. 25	17
Dent v. West Virginia, 129 U. S. 114	19
Frank v. Mangum, 237 U. S. 309, 334, 35 S. Ct. 582	16, 18
Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358	25
Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215	25
McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608	11, 28
Parsons v. Bedford, 3 Pet. 433, 443, 28 L. Ed. 433	18, 20
The Queen v. Miles, L. R. 24 Q. B. D. 423, 431	17
Southern Pacific R. Co. v. U. S., 168 U. S. 1, 48, 18 S. Ct. 18	18
Thorn v. Browne, 257 F. 519 (C. C. A. 5), cert. denied 250 U. S. 645, 39 S. Ct. 494	20
Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241	25
U. S. v. Adams, 281 U. S. 202, 50 S. Ct. 269	23, 24
United States v. Barber, 219 U. S. 72, 78, 31 S. Ct. 209, 55 L. Ed. 99, 101	17
United States v. De Angelo, 139 F. 2d 466 (C. C. A. 3)	24, 25
U. S. v. Oppenheimer, 242 U. S. 85, 88, 37 S. Ct. 68	16, 17, 18

MISCELLANEOUS.

	Page
Constitution of the United States:	
5th Amendment	16, 18
7th Amendment	18, 19
Title 18 U. S. C. A. Sections 72 and 80	4
Title 18 U. S. C. A. Section 88	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT SEALFON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, ROBERT SEALFON, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit, dated May 8, 1947, affirming a judgment of the District Court of New Jersey, convicting your Petitioner of the crime of uttering and causing to be uttered forged invoices for the purpose of defrauding the United States, and sentencing him to serve five years in prison on each of twelve counts of the indictment, to run concurrently, and in addition thereto to pay a fine of $1,000 on each of the said counts.

On May 19, 1947, the Circuit Court continued your Petitioner on bail pending the filing of the petition for a *writ of certiorari.*

On June 5, 1947, time for filing petition having been extended by your Honorable Court for an additional period of 30 days, the Circuit Court of Appeals further continued your Petitioner on bail pending the determination of the petition for a *writ of certiorari.* (R. 548).

A.

Statement of the Case.

1.

Fresh Grown Preserve Corporation manufactured jams and syrups in Lyndhurst, New Jersey. Murray Greenberg was its president; Leo Greenberg, a brother of Murray, was its vice-president (R. 137). Under the Government's sugar ration regulations the corporation was alloted for the year 1943 and up to April 11, 1944, a basic quota of 2,308,953 pounds of sugar (R. 95-96). It was not lawfully entitled to additional sugar unless it obtained replacement certificates for sugar used in making a product actually delivered to an exempt agency within the United States, such as the Army or Navy, or for export to a foreign country (R. 84-87).

Replacement certificates could be issued by the local ration board upon written application, in which the applicant had to state the name of the particular agency and the time when the sugar-containing product was delivered (R. 87). In addition, proof was required to substantiate the application by evidence showing that the product "had in fact (been) delivered" either for export or to an exempt agency (R. 88).

To circumvent the regulations and to defraud the United States in its governmental function of rationing sugar, Fresh Grown Preserve Corporation, acting through its officers Murray and Leo Greenberg, filed with its local ration board in Rutherford, New Jersey, false applications for replacement certificates and in support thereof submitted forged invoices purporting to show deliveries of sugar-containing products to exempt agencies. Out of 868 forged invoices 596 indicated deliveries to the Brooklyn Navy Yard of vanilla syrup sold to Sero Syrup Company, Brooklyn, New York, the latter being the trade name of Petitioner's business (R. 239, 248, 270). The remaining invoices indicated deliveries to other exempt agencies on behalf of other customers (R. 206, 212, 256, 261).

During the year 1943 and up to April, 1944, the ration board on the basis of the false applications filed by the Greenbergs issued replacement certificates which enabled the Greenbergs to obtain illegally over 25 million pounds of sugar above their corporation's basic quota (R. 190, 272-273).

All of the replacement certificates were issued to the Fresh Grown Preserve Corporation and were presented by the Greenbergs to sugar refining companies whose records show that the more than 25 million pounds of sugar called for by the certificates were delivered to the Greenbergs (R. 263, 266, 272).

Out of the sugar thus illegally obtained the Greenbergs used over 9 million pounds in the manufacture of imitation vanilla syrup—a non-rationed product (R. 94)—which they, pursuant to a written contract (R. 143, 520), sold to Petitioner's company (R. 68-69, 191, 282-284). The remaining 15 million pounds of sugar were used by the Greenbergs in making other products sold to other companies with which Petitioner had no connection whatever (R. 191-192).

Ninety-eight per cent of the syrup purchased by Petitioner was sold by him to the National Biscuit Company of New York, and was delivered to that company directly from the factory operated by the Greenbergs (R. 285-287, 298). At no time did Petitioner attempt to conceal that fact. The Government's proof showed that Petitioner's books, vouchers and checks, as well as those of the trucking company which delivered the syrup for him, contained a full and accurate record of every bit of syrup purchased from the Greenbergs and delivered to the National Biscuit Company (R. 277-284, 296-299, 303, 313-315).

2.

Based upon the foregoing transactions the Government filed two indictments against Petitioner. The first indictment charged that between January 1, 1943 and April 15, 1944, "and continuously from day to day during such pe-

riod" (Exh. D-3, par. 3), Petitioner, together with Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg, S. J. Baron Corporation and others conspired to defraud the United States (Title 18 U. S. C. A. Section 88) and to commit offenses against the United States (Title 18 U. S. C. A. Sections 72 and 80).

Specifically, the object of the alleged conspiracy was to defraud the United States in its governmental function of conserving and rationing sugar by uttering and causing to be uttered to the Ration Board of Rutherford, New Jersey, "false, forged and counterfeited writings purporting to be true and correct copies of invoices" for sugar-containing products falsely claimed to have been sold and delivered by Fresh Grown Preserve Corporation to exempt agencies, and thereby to induce the Ration Board to issue to Fresh Grown Preserve Corporation sugar purchase certificates over and above its fixed or basic quota (Exh. D-3, pars. 3, 3a, 3b, and 3c).

The second indictment, in twelve separate counts, each identical with the other except as to time and contents of the invoices, charged that on October 19, 1943, and on various dates thereafter up to April 6, 1944—a period of time expressly included within the continuous conspiracy alleged in the first indictment—Petitioner together with Fresh Grown Preserve Corporation, Murray Greenberg and Leo Greenberg committed the substantive crime alleged in the first indictment as the primary object of the conspiracy, to wit, uttering and causing to be uttered to the Rutherford Ration Board false and forged invoices for the purpose of defrauding the United States (R. 8-33).

A trial was first had under the conspiracy indictment before District Judge Thomas F. Meaney and a jury. At that trial Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg and S. J. Baron Corporation pleaded guilty (Exh. D-2, 13, 563). Other defendants whose names are not mentioned here were acquitted by direction of the court (Exh. D-2, 436-438, 563). This left Petitioner

as the only defendant on trial, and since there was admittedly no transaction between him and the S. J. Baron Corporation (Exh. D-2, 503-504), the sole question submitted for the jury's determination was whether he entered into a partnership in crime with the Greenbergs and Fresh Grown Preserve Corporation. The court charged the jury that

> "If upon a consideration of all the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted" (Exh. D-2, 578).

In answer to that question the jury said "Not guilty", and a judgment of acquittal was thereupon duly entered (Exh. D-1).

Twenty days later Petitioner was placed on trial before the same judge and a different jury under the second indictment, resulting in the judgment at bar. The Greenbergs and Fresh Grown Preserve Corporation again pleaded guilty (R. 5). And again, the question was whether Petitioner was their associate in the commission of the crime.

No claim was made that Petitioner at any time prepared, filed or handled a single false application or forged invoice, or that he was even present when any such act was done. The members of the ration board never saw Petitioner and did not know who he was (R. 231, 234, 244, 258). They testified that Leo Greenberg was the only one who appeared at the ration board and there filled out and signed the false documents (R. 230, 238, 246, 248, 254, 257). The prosecuting attorney was therefore forced to admit that

> "There is no doubt from the evidence * * * that Leo Greenberg took the applications and the invoi

to the ration board and filled out and signed every one of them" (R. 518-519).

To prove Petitioner guilty of the crime of uttering the false invoices the prosecutor relied upon the Aiding and Abetting Statute, 18 U. S. C. Section 550, which provides that one who "aids, abets, counsels, induces, or procures" another to commit a crime "is a principal" (R. 59-60, 522). It was upon the issue of whether Petitioner was an aider and abettor that the case was submitted to the jury (R. 542-543), the court stating that,

> "The defendant must be acquitted if the jury should entertain a reasonable doubt that this defendant did knowingly, wilfully and feloniously aid, abet or counsel either Greenberg or Fresh Grown Preserve Corp. in the preparation or presentation of the false and fictitious documents" (R. 555).

In support of the aiding and abetting charge the prosecutor resubmitted the same evidence which was received at the prior trial in his attempt to show that Petitioner conspired with the Greenbergs to utter the false invoices. As stated in the opinion of the Circuit Court, "the evidence was substantially the same in the two trials." (See printed Record certified to this Court. R. 592).

Before the trial began and even before the jury was selected (R. 55), Petitioner moved to dismiss the indictment on the ground of the prior judgment of acquittal in the conspiracy case relying on the indictment and record of the former trial and the judgment of acquittal (R. 37-38, 54, Exhibits D-1, D-2 and D-3).

Petitioner's motion was denied. Thereafter he pleaded not guilty to the indictment on the substantive charge and despite Petitioner's contention throughout the trial that the issues regarding the conspiracy and agreement between Petitioner and other alleged co-conspirators had been determined in the former trial, the court refused to admit or

consider record proof of his acquittal on the conspiracy charge (R. 64-65, 81-82, 216, 341, 344-345, 358-359).

In support of its position the court relied upon the well-settled rule that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy (R. 48, 73, 80), and from that rule the court concluded that

> "a man may be guilty of aiding and abetting the commission of a crime and still not be a conspirator, or he may be a conspirator and still not be an aider and abettor" (R. 73-74).

Conceding arguendo that this is not an erroneous statement in general, upon the facts of this case it is inapplicable. This was not a case in which the Government relied upon proof of circumstances from which the jury might have inferred the existence of an agreement or conspiracy to commit the offense. In this case, only one of the alleged co-conspirators and parties to the illicit agreement pleaded not guilty. Those who pleaded guilty testified as to the existence of the illicit agreement in fact. (See Opinion of the Circuit Court printed in Record certified to this Court.) The evidence at the second trial permitted no inference, if believed, other than that the "aiding, abetting and counseling" with which Petitioner was charged consisted solely of the alleged conspiracy and agreement between Petitioner and the same persons named as co-conspirators in the first indictment.

The only difference between the two trials was the prosecutor's theory. The evidence, the issues, the contentions remained the same. The prosecutor not only relied upon the identical false applications and invoices received at the former trial on the theory of conspiracy (Exh. D-2, 124, 127, 568); he also called the same witnesses who repeated their testimony almost *ipsissima verba*. The Circuit Court agreed that "The identical invoices, the letter, the same testimony and exhibits were admitted in the evidence", and it held that "The very record of the first trial could

have been introduced at the second trial under stipulation, and the case submitted upon it alone" (See Opinion printed in Record certified to this Court R. 592).

Indeed, the identity of the two trials was so complete that the prosecutor did not even have to change his summation. A few illustrations will suffice. Before quoting them it is important to bear in mind that the illustrations deal with a letter admittedly written by Petitioner to the Fresh Grown Preserve Corporation, *the writing of which was alleged in the first indictment as an overt act committed by Petitioner in furtherance of the conspiracy* (Exh. D-2, 19-20).

(These illustrations are set out in Appendix A hereof.)

The letter, which at the first trial was alleged as an overt act committed by Petitioner in furtherance of the conspiracy (Exh. D-2, 19-20) and at the present trial was alleged as "the principal feature of his aiding and abetting of Greenberg" (R. 537), was in fact always "retained in the files of the Fresh Grown Preserve Company" (R. 143). It was never presented to the ration board. The members of the board testified that they never saw the letter, never heard of it, and that if it had been presented to them it would have been attached to the applications filed by Greenberg and kept in the files of the ration board (R. 232, 237, 244-245, 254-255).

Such being the Government's proof, the letter played no part whatever in deceiving the ration board to issue sugar replacement certificates to the Greenbergs, who obtained the certificates solely by preparing and submitting false applications and forged invoices. The trial court, therefore, charged the jury that the "discussion which was had between Greenberg and Sealfon is *the crux* of this situation" (R. 550).

That discussion, however, dealt with the alleged corrupt "deal" (R. 141, 146) or "arrangement" (R. 142, 150, 151, 152, 153, 154, 186, 209) whereby Petitioner who sold syrup to "a civilian company at the Brooklyn Navy Yard"

was to write a letter to Greenberg's corporation "saying that he was selling to or at the Brooklyn Navy Yard without mentioning the civilian company" and thus "leave the inference" that he was selling directly to the Navy Yard. In return for the letter Greenberg agreed to sell more syrup to Petitioner and to give him "a cheaper price in the form of a rebate" (R. 140-141). Greenberg testified, "Write me that letter and you have got a deal" (R. 141); and the prosecutor described his testimony as "the talk and planning between Murray Greenberg and Sealfon" and as "that plan, to file a false letter" (R. 529, 530).

Obviously, whether or not Petitioner entered into a corrupt "deal", "arrangement" or "plan" with Greenberg to deceive the ration board by uttering forced invoices was the only issue at the conspiracy trial, and the jury's verdict of not guilty necessarily determined that issue in favor of Petitioner. Thus that which the trial court designated as "the crux of this situation" was formerly litigated and determined against the prosecution, for an acquittal of conspiracy, the gist of which is the corrupt agreement, is an acquittal of the "deal" or "plan" to commit the crime.

In short, the second trial was nothing more than a retrial of the conspiracy case before another jury under the different title of "aiding, abetting and counselling" the same co-conspirators.

Yet the trial court rejected Petitioner's argument that the doctrine of *res judicata* or estoppel by judgment prevented the relitigation of the matters theretofore settled between the parties and over his objection admitted into the evidence proof of the conspiracy and agreement between Petitioner and the other aleged co-conspirators. Moreover, the Court, after having rejected the doctrine of *res judicata* rightly or wrongly, thereafter prevented Petitioner from producing evidence on his own behalf in the form of the record proof of his acquittal of the conspiracy charge. The Circuit Court of Appeals sustained the trial court's actions throughout.

B.

The Questions Presented.

The following three questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

(1) A defendant is tried for the crime of having conspired with another to utter false invoices for the purpose of defrauding the United States and is found not guilty by verdict of a jury. Thereafter, the same defendant is charged as a principal with the commission of the substantive offense of uttering the same false invoices on the theory that he aided and abetted the same individual named as the co-conspirator in the conspiracy indictment of which he was acquitted. Question: Where the fact of such conspiracy is essential to proof of his guilt of said substantive offense may this question be relitigated by the Government or is evidence of such conspiracy inadmissible in the trial on the charge of the substantive offense as being in violation of the due process clause of the U. S. Constitution, Fifth Amendment in that (a) it is contrary to the common law principle of *res judicata*, and (b) it permits the re-examination of a fact tried by a jury and found in favor of a defendant in a criminal case?

(2) Where the Government (rightly or wrongly) is permitted to relitigate the same issue of conspiracy by offering the same proof of the same agreement, is the defendant denied due process of law and the constitutional right of producing evidence in his own behalf by the trial court's refusal to admit or consider record proof of the former acquittal of the conspiracy?

(3) If the issue involving the same alleged agreement between petitioner and the same individual cannot be relitigated with the result that such evidence is inadmissible in the trial of the substantive offense, is that evidence which

was properly admitted sufficient to prevent judgment of acquittal?

C.

Reasons Relied On for Allowance of the Writ.

In the decision sought to be reviewed, the Circuit Court of Appeals has decided important questions of federal criminal law in a way probably in conflict with applicable decisions of its own as well as those of this Honorable Court and has sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of your Honorable Court's power of supervision under the rule of *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608. The decision sought to be reviewed invades constitutional rights and establishes a dangerous precedent by its holding that the former judgment of acquittal settled nothing. It runs counter to the decisions of this Honorable Court that the principle of *res judicata* does apply in criminal cases.

Indeed, it is far more important that this fundamental principle of justice apply to cases where life and liberty are at stake than where the controversy involves merely a debt. If the decision of the court below is permitted to stand, it will place in the hands of prosecuting attorneys the power of subjecting one charged with conspiracy to successive prosecutions based upon the same evidence without being bound by the results achieved in the first trial. Thus, by filing two indictments with different titles—one charging conspiracy, the other charging commission of the substantive offense by aiding and abetting—a prosecutor could harass the defendant by successive trials and put him in peril repeatedly even after a jury has rendered a verdict of not guilty on the only issue involved. It would mean that the first trial on the conspiracy charge could be viewed merely as a preliminary or practice skirmish which would enable the prosecutor to determine the nature of the defense and, in the light of the experience obtained, increase

the likelihood of a conviction in the second trial. That is precisely what was done in the case at bar and if tolerated would open the door to successive prosecutions based upon the same asserted conspiracy of one who was found not guilty of the very same conspiracy after full and fair trial.

Petitioner does not contend that prosecutors may not elect to try a substantive offense separately from a conspiracy to commit that substantive offense. He does assert that whichever issue is settled first must remain settled forever—if it be the whole issue at the second trial, that whole issue is concluded; if it embraces only part, that part is concluded.

Moreover, if this decision is permitted to stand uncorrected, it will result in a denial to the accused of the fundamental right to produce evidence in his own behalf since the trial court refused to admit or consider record proof of the former acquittal of the conspiracy.

Finally, if your Petitioner is correct in his contention that the issue of the agreement and conspiracy could not properly be relitigated so that the evidence thereof was inadmissible, the evidence which was otherwise properly admitted was insufficient to sustain the conviction.

Your petitioner, therefore, believes that this application presents a case cognizable by your Honorable Court under the Constitution and Statutes of the United States and the rules of this Honorable Court, and one eminently proper for review.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your Petitioner may have such other

and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: July 3, 1947.

ROBERT SEALFON,
Petitioner.

By ROBERT T. MCCRACKEN,
LEMUEL B. SCHOFIELD,
THOMAS D. MCBRIDE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

The Decision Sought to be Reviewed Is in Violation of the Due Process Clause (U. S. Constitution, 5th Amendment) in That (a) It Is Contrary to the Common Law Principle of Res Judicata and (b) It Permits the Re-examination of a Fact Tried by a Jury and Found in Favor of a Defendant in a Criminal Case.

Petitioner was subjected to two trials. In the first the Government sought to prove that he had entered a co-partnership in crime with the Greenbergs and others charged as co-conspirators. The Greenbergs and their corporation, Fresh Grown Preserve Corp., alleged co-conspirators, pleaded guilty. The Government's proof was not limited to evidence of the commission of certain acts and surrounding circumstances from which the criminal agreement could be inferred. Rather, the Government, in the first trial, produced direct evidence of an alleged agreement between Petitioner and the other alleged co-conspirators. Petitioner was found not guilty. In the second trial, the Government sought to prove that he was guilty of the substantive offense, jointly with the same Greenbergs and their corporation, Fresh Grown Preserve Corp. Again, the others indicted with the Petitioner pleaded guilty. The Government was allowed to produce direct proof in the second trial that Petitioner was an "aider and abettor" and therefore a "principal" because he had entered into an agreement with the Greenbergs. Over Petitioner's repeated objections, the Government was permitted to retry before another jury the question of whether Petitioner had in fact and law entered into a co-partnership in crime with the Greenbergs and their corporation. The Trial Judge's action as affirmed by the Circuit Court of Appeals is herein

challenged by Petitioner as being in violation of his constitutional rights.

In order to understand what this case is, it is important to know what it is not. Petitioner is not now attempting to have this Court incorporate into the language of the 14th Amendment those safeguards and rights which are expressly found in one of the first eight amendments. This is a case which must be determined purely under federal law. The trial occurred in a federal court and there can be no question therefore of Petitioner's right to the protection of the 5th Amendment in that trial.

Petitioner does not contend that his protection against *double jeopardy* as guaranteed by the 5th Amendment has been violated. It is conceded that since conspiracy is an offense which is different from the commission of the substantive offense, he was not put in double jeopardy when he was tried on the second indictment. Petitioner also concedes that the common law principle of *autrefois acquit* does not apply.

However, your Petitioner claims that his rights as guaranteed by the due process clause of the 5th Amendment have been violated as a result of the action of the trial court, sanctioned by the Circuit Court of Appeals. He maintains that the due process clause of the 5th Amendment requires (a) the application of the common law principle of *res judicata;* and (b) prohibits in favor of a defendant in a criminal trial the re-examination of any fact tried by a jury otherwise than according to the rules of the common law.

A.

Res Judicata.

This Court, many years ago, held that the fundamental principle of *res judicata* is "as applicable to decisions of criminal courts as to those of civil jurisdiction." *Frank v. Mangum,* 237 U. S. 309, 334, 35 S. Ct. 582.

Such a "fundamental principle of justice" *(U. S. v. Oppenheimer,* 242 U. S. 85, 88, 37 S. Ct. 68) must of neces-

sity be part of due process of law. As stated by Mr. Justice Brandeis *(Collins v. Loisel,* 262 U. S. 426, 430, 43 S. Ct. 618): "The 5th Amendment in providing against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases."

It is to be noted that this principle applies whenever there has been a determination on the merits—whether by a jury or otherwise—of a matter in controversy. For example, the doctrine of *res judicata* may be invoked where judgment of acquittal follows upon a plea of the statute of limitations, even though the defendant had not been tried by a jury upon the facts of the offense charged. *U. S. v. Oppenheimer,* 242 U. S. 85, 87, 32 S. Ct. 68. As Mr. Justice Holmes there stated:

"Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits (*United States v. Barber,* 219 U. S. 72, 78, 31 S. Ct. 209, 55 L. Ed. 99, 101), and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the from of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. • • • In this respect the criminal law is in unison with that which prevails in civil proceedings.' Hawkins, J., in *The Queen v. Miles,* L. R. 24 Q. B. D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Com. v. Evans,* 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins

says. *Com. v. Ellis,* 160 Mass. 165, 35 N. E. 773; *Brittain v. Kinnaird,* 1 Brod. & B. 432, 129 Eng. Rep. 789, 4 J. B. Moore, 50, Gow, N. P. 164, 21 Revised Rep. 680. Seemingly the same view was taken in *Frank v. Mangum,* 237 U. S. 309, 334, 35 S. Ct. 582, 59 L. Ed. 969, 983, as it was also in *Coffey v. United States,* 116 U. S. 436, 445 (446), 6 S. Ct. 437, 29 L. Ed. 684, 687."

Res judicata is thus an essential ingredient of the judicial process. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Travelling Men's Assn.,* 283 U. S. 522, 525, 51 S. Ct. 517. See also *Southern Pacific R. Co. v. U. S.* 168 U. S. 1, 48, 18 S. Ct. 18.

B.

Due Process (5th Amendment) and the 7th Amendment.

Moreover, what is proscribed by the 7th Amendment in civil suits where the value in controversy exceeds $20.00 also comes within the scope of the protection afforded by the due process clause of the 5th Amendment. Surely, the protection to which he is entitled when he is a defendant in a suit in which the value in controversy exceeds $20.00, Petitioner may rightfully claim in a criminal suit where that which is in controversy involves his liberty. "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *U. S. v. Oppenheimer,* 242 U. S. 85, 87, 32 S. Ct. 68.

The history of the 7th Amendment indicates that its purpose was to assure trial by jury in civil cases. As stated by Mr. Justice Story (*Parsons v. Bedford,* 3 Pet. 433, 443, 28 L. Ed. 433), "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest

jections originally taken against the Constitution of the ited States, was the want of an express provision secur- the right of trial by jury in civil cases. As soon as the nstitution was adopted, this right was secured by the enth amendment of the Constitution proposed by Con- ess, and which received an assent of the people so general to establish its importance as a fundamental guarantee the rights and liberties of the people." And, in referring the proscription against re-examination of a fact tried by ury otherwise than according to the rules of the common v, Justice Story characterized this clause of the 7th nendment as "still more important, and we read it as a bstantial and independent clause." There was no need include within its language an express guarantee to a fendant in a criminal case since the 5th Amendment ac- mplishes this result by the safeguard of due process, ich embodies those ancient rights which came to us rom the law of England." *Dent v. West Virginia*, 129 S. 114.

That nowhere in the Bill of Rights is it expressly stated at a fact tried by a jury and found in favor of a defend- t in a criminal case cannot be re-examined, does not mean at such a fundamental right of the accused does not exist. was unnecessary expressly to set forth this safeguard. oreover, there is no mutuality in the application of this ndamental principle. The protection is universally ac- rded only to the accused. So far as the prosecution is ncerned, it must prove, each time a defendant is tried, ery essential element of the crime charged. It can be seen erefore that to have included criminal cases in the lan- age of the proscription of the 7th Amendment against examination of facts would have been contrary to the mmon understanding and purposes of the framers of the nstitution and in violation of those fundamental rights ssessed by the accused then and now under the English d American law.

The only methods known to the common law to re-ex- ine facts tried by a jury are (1) the granting of a new

trial by the court wherein the issue was tried, or to which the record was properly returnable; and (2) the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. *Parsons v. Bedford*, 3 Pet. 433, 28 L. Ed. 433; *Thorn v. Browne*, 257 F. 519 (C. C. A. 5); cert. denied 250 U. S. 645, 39 S. Ct. 494.

To allow a re-examination of a fact once tried by a jury and found in favor of a defendant would therefore violate the due process clause of the 5th Amendment.

C.

Errors of the Courts Below.

Application of these principles to the questions herein presented requires the conclusion that both the trial court and the Circuit Court of Appeals committed fundamental prejudical and harmful error. Whether Petitioner had entered into a conspiracy or criminal co-partnership with the Greenbergs was the matter that had been contested in the trial on the conspiracy indictment. The final result of that trial settled that issue forever *vis a vis* the United States and Petitioner.

Additionally, whether Petitioner had entered into a conspiracy or criminal co-partnership with the Greenbergs was a fact tried by a jury and could not be otherwise re-examined in any Court of the United States than according to the rules of the common law. Neither of the modes known to the common law for the re-examination of facts tried by a jury were or could be resorted to by the Government in this criminal case.

We concede that Petitioner's acquittal of the conspiracy charge did not *bar* his prosecution on the indictment charging the substantive offense—even though guilt of the substantive crime might consist in his "aiding and abetting" one who actually committed the prohibited act. It is precisely on this point that the Circuit Court of Appeals fell into error. That Court, in its opinion per Albert Lee

Stephens, Circuit Judge, confused the common law principles of *res judicata* and the proscription against re-examination of facts once tried by a jury on the one hand, with the doctrines of double jeopardy and *autrefois acquit* on the other hand. In doing so it misapplied a decision of its own Circuit as well as a recent Supreme Court decision. The Court states (see Opinion printed in Record certified to this Court R. 590, 591).

> "There is conclusive authority for the rule that where a conspiracy to commit a crime is charged as an offense, neither an acquittal nor a conviction of a conspiracy to commit the crime is per se a bar to a prosecution for the commission of the crime, or for aiding and abetting another to commit it. The two are distinct and separate crimes. Carter v. McClaughry (1902), 183 U. S. 365; Louie v. United States (Cir. 9, 1914), 218 Fed. 36; Bens v. United States (Cir. 2, 1920), 266 Fed. 152; and Curtis v. United States (Cir. 10, 1933), 67 Fed. 2d 943. On page 643 of the opinion in the very late case of Pinkerton v. United States (1945), 328 U. S. 640, appears the following: 'Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U. S. 354, 355-356; Gebardi v. United States, 287 U. S. 112, 121-122.'
>
> Wisely or not, the doctrine that the conspiracy fuses into and becomes one with the accomplished crime is not made the American rule. By operation of statute the 'aider and abettor' of the commission of a crime is a principal in the crime, and is punishable as though he actually was the perpetrator of the crime. Title 18

"U. S. C. A. § 550 provides 'that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.'

In Pinkerton v. United States, supra, the Supreme Court upheld the conviction of a man on a substantive crime upon evidence that he had conspired with the actual perpetrator, and no evidence had been given that he had withdrawn from the conspiracy before the crime was committed. The theory was that since the conspiracy continued through the actual commission of the crime, 'The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle:' (Page 647.)"

We submit that the Circuit Court has misconstrued the *Pinkerton* decision. This Court there held that a person may be guilty of both a conspiracy and the commission of a substantive offense simultaneously. The *Pinkerton* decision has no application to the pivotal question at issue here. Petitioner does not now contend that the doctrine of double jeopardy here applies. It is conceded that the indictments charged two *different* offenses. In proving that which was charged in the second indictment, however, the Government succeeded in relitigating the issue of whether a criminal conspiracy and co-partnership had existed between Petitioner and the Greenbergs. It also succeeded in re-examining the asserted fact of such criminal conspiracy and co-partnership after it had already been tried before a jury. The *Pinkerton* case does not sanction such practice. Nor could it, in view of the requirements of the due process clause. If the prosecuting attorney chooses to proceed against a defendant by separate and successive trials, under indictments such as those herein considered, he must run the

risk of an unsuccessful conclusion in the first trial of an issue which may be partly or wholly in issue in the second trial.

Application of the principle of *res judicata* requires only that the parties to the controversy be the same and that a particular controverted matter be settled. It is not necessary that the precise issues be involved as the whole of the second trial nor that the evidence in both trials be identical for *res judicata* to apply. The parties to the controversy being the same, all matters involved in the first contest are concluded by the result reached in that trial.

The doctrine of *res judicata* required that in the instant case the Government be foreclosed by the result in the first trial as to the matter of the conspiracy, irrespective of the identity of evidence. *U. S. v. Adams*, 281 U. S. 202, 50 S. Ct. 269. It so happens that in this case, as the Circuit Court of Appeals stated, substantially the same evidence and proof was offered by the government in both trials. That does not control the present point. What is of consequence is that the first trial settled for all time the question of whether the Petitioner was a co-conspirator and co-partner in crime with the Greenbergs and the other alleged co-conspirators.

Yet the trial court completely rejected Petitioner's contention to this effect. In his charge to the jury on the second trial, the trial judge stated,

> ". . . and in that discussion which was had between Greenberg and Sealfon is the crux of this situation" (R. 550).

The discussion which the judge properly called the "crux of this situation", was the very same discussion which constituted the conspiracy charged. If the discussion occurred, Petitioner might have been both a co-conspirator and an aider and abettor. If it did not occur, he was neither. And the first trial established, once and for all, that it did not occur.

The jury in the conspiracy case by its acquittal necessarily found that Petitioner did not enter into an agreement with the alleged co-conspirators. Therefore, evidence admissible only to prove such criminal agreement was inadmissible in the present case. This was specifically held in a previous decision of the Third Circuit, *United States v. De Angelo*, 139 F. 2d 466 (C. C. A. 3), thought by the court below to be inapplicable to this case. The Court there stated, 138 F. 2d at page 468, "The conclusiveness of a fact which had been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. *U. S. v. Adams*, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807."

The trial court's ruling thus is in direct conflict with the doctrine of *res judicata*, and the proscription against re-examination of a fact once tried by a jury. It is submitted that the affirmance of this ruling by the Circuit Court was in direct conflict with its own prior decision, and sanctions a violation of retitioner's rights under the 5th Amendment.

II.

Defendant Was Denied His Constitutional Right of Producing Evidence in His Own Behalf.

Throughout the trial of this case, the trial judge not only refused to admit but also refused even to consider proof of Petitioner's former acquittal of conspiracy (R. 64-65, 81-82, 216, 341, 344-345, 358-359). Thus, when counsel for Petitioner offered "to open to the jury on the theory that the issue of Sealfon's participation in the crimes charged in this indictment was present in and material to the trial on conspiracy heretofore tried, and which resulted in the jury's verdict of acquittal in favor of Mr. Sealfon

and conclusively answered that issue adversely to the Government—", the court denied him this right, stating, "Yes, and the ruling is that I will not permit that because I don't think it is proper either in the opening to the jury or on summation. Counsel may have an exception to both rulings." (R. 359).

This amounted to a denial of the right of a defendant to produce evidence in his own behalf, the barest minimum requirement of due process.

There could be no better proof of the defendant's non-participation in the copartnership to defraud the United States and to utter the false invoices than the record proof of his acquittal in the conspiracy trial. Suppose that defendant had offered in evidence competent and admissible oral testimony that he had not made the agreement. No one would deny that the refusal of the trial judge to hear such testimony would constitute a violation of defendant's right to produce evidence in his own behalf. Yet such oral evidence would in itself not be conclusive. The jury would have to pass upon the question of credibility. Here, however, that which the defendant was prevented from placing in evidence was incontrovertible documentary evidence in the form of record proof that he had not made the agreement. This proof would have been conclusive upon both court and jury. *A fortiori*, the trial court's action was a denial to the Petitioner of his right to produce evidence in his own behalf and was thus in violation of the due process clause. Cf. *Tot v. United States*, 319 U. S. 463, 63 S. Ct. 1241; *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358; *Manley v. Georgia*, 279 U. S. 1, 49 S. Ct. 215; *Bailey v. Alabama*, 219 U. S. 219, 31 S. Ct. 145.

In *U. S. v. De Angelo*, 138 F. 2d 466 (C. C. A. 3) the defendant, having been acquitted of the substantive offense of robbery was subsequently tried for conspiracy to commit the robbery. At his trial, he offered in evidence record proof of the acquittal to controvert Government evidence as to a fact found in his favor in the former trial. The trial court received the proof in evidence "subject to the

limitation that it be not disclosed or otherwise made known to the jury." Of this action, the Circuit Court of Appeals said (138 F. 2d at p. 469): "We think that the trial court's rejection of the appellant's offers, which became relevant because of the government's allegations and evidence, constituted substantial error. Cf. *Crawford v. U. S.*, 212 U. S. 183, 203, 29 S. Ct. 260, 53 L. Ed. 465, 15 Am. Cas. 392."

III.

The Properly Admitted Evidence Was Insufficient to Go to the Jury.

This highlights the importance to Petitioner of a proper decision of the pivotal question discussed above. The entire theory of the prosecution was, as disclosed by Government Counsel's opening speech, that a conspiracy in fact existed between Petitioner and the Greenbergs. As in the prior trial, this was not a case in which the Government was driven to proof of the conspiracy or agreement by inference from overt acts or surrounding circumstances. Here, the alleged co-conspirators pleaded guilty and, in both trials, testified to the *actual agreement*. Government Counsel stated (R. 66-67).

> "We will show you a conversation took place between Sanford Doctors and Murray Greenberg and that as a result of that conversation Sanford Doctors went and talked to Robert Sealfon and told him Murray Greenberg had proposed that if Sealfon would write a letter listing the names of some customers of his, and if there were any exempt agencies to include those, that he, Greenberg, and the Fresh Grown Preserve Company, would be able to sell syrup to Sealfon in larger quantities. We will give you the full conversation that took place between Doctors and Sealfon; and we will then prove that a letter was written. We will also prove that before it was written there was conversation between Murray Greenberg and Robert

Sealfon in which both persons perfectly well understood, as you will see from the testimony of the conversation, that the letter was going to be fictitious; because Sealfon was told by Murray Greenberg that even though he was not dealing with exempt agencies, that if he would indicate in that letter that he was so dealing, that letter would be used by Greenberg in order to get more sugar from the ration board.

And we will also bring evidence to show you that Robert Sealfon knew from that conversation the way in which it was going to be used, and knew that Murray Greenberg and the Fresh Grown Preserve Company were going to prepare false invoices, using the names contained in that letter, to submit to the Rutherford Ration Board, attached to applications for replacement of sugar, and to make it appear to the Rutherford Rationing Board that sales of syrup were being made by Robert Sealfon to the Brooklyn Navy Yard, whereas both of them knew that that was not true."

The whole structure of the Government's case against Petitioner rested on proof of the alleged agreement to violate the laws of the United States followed by the commission by other persons of various acts pursuant thereto. Once the evidence of such agreement is stricken out, as we maintain it must be, the structure collapses.

The overt acts other than the writing of the letter were committed not by the Petitioner but by the other alleged co-conspirators and evidence thereof was inadmissible against the Petitioner except upon proof of the conspiracy. It is of no consequence that the jury might be asked in the second trial to find the conspiracy from the overt acts rather than proof of the actual agreement. The point is that it had been finally and conclusively settled between the Government and Petitioner that Petitioner was not a party to any such agreement irrespective of any evidence whatever.

The Government's case therefore necessarily fails without such inadmissible proof. Therefore judgment of acquittal ought to have been entered pursuant to Petitioner's motion.

CONCLUSION.

We respectfully submit that this is a case which deserves review by this Honorable Court. Grave constitutional questions are directly put in issue. In addition, it is submitted that since this case presents serious questions affecting the administration of federal criminal law it calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

ROBERT T. MCCRACKEN,
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THOMAS D. MCBRIDE,
Counsel for Petitioner.

APPENDIX A.

Excerpts From Prosecutor's Summation in Both Trials.

At the conspiracy trial	*At the present trial*
1. "the letter, the all-important letter was written. • • • He entered into the conspiracy by this act and by his negotiations concerning it" (Exh. D-2, 546, 559).	1. "writing the letter which was, of course, the principal feature of his aiding and abetting of Greenberg" (R. 537).
2. "We don't have to prove that this letter was exhibited to the local OPA board • • • That wasn't the plan at all" (Exh. D-2, 549-550).	2. "And much has been made • • • about the fact that Sealfon didn't get over to the Rutherford Ration Board or make any contact at all there. That wasn't part of the plan" (R. 538).
3. "He knew that he wasn't going to deliver it to any exempt agency or to any name that was on his letter, and he can't fool you now by saying that he was talking about his past sales or his personal sales • • • that this letter says 'our sales', and that it means 'our sales independently of the supply that came in from the Fresh Grown Preserve Company'" (Exh. D-2, 557-558).	3. "I say to you that you can't be naive enough to think that Sealfon was talking about what he might have done in the past with his own syrups. It is perfectly clear that he wanted to show in here,—no matter what language he used and in spite of the fact that he used the word 'our'—what he was going to do with syrup that he got from Greenberg. • • • He knew • • • he had never delivered to any exempt agency" (R. 531, 532).

At the conspiracy trial	*At the present trial*
4. "let us reflect on the position that Sealfon found himself in prior to March 3, 1943 (the date of the letter). He had an arrangement before February 17th with the National Biscuit Company" (Exh. D-2, 547).	4. "Let us consider • • • the position in which Sealfon found himself approaching the date of March the 3rd • • • Let us consider that he had this opportunity • • • in February of 1943 to sell • • • syrup to the National Biscuit Company" (R. 519).
5. "Greenberg told Sanford Doctors to go to Sealfon and get from Sealfon a letter • • • and to tell Sealfon that if he wrote it he, Sealfon, could get syrup from Greenberg in larger quantities" (Exh. D-2, 548).	5. "Mr. Sanford Doctors said that he went and told Sealfon that if the letter would be written, he gave Murray Greenberg's message to Sealfon, that if the letter would be written he, Sealfon, would get syrup in larger quantity" (R. 520-521).

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IN THE

Supreme Court of the United States

No. 174.

October Term, 1947.

ROBERT SEALFON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

ROBERT T. McCRACKEN,
LEMUEL B. SCHOFIELD,
THOMAS D. McBRIDE,
Counsel for Petitioner.

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TABLE OF CITATIONS.

	Page
Kotteakos v. United States, 328 U. S. 750, 765	5
Pinkerton v. United States, 328 U. S. 640	1, 2, 5

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BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

I.

Petitioner submits that the Government misapprehends the question presented by the Petition. As stated in its Brief (p. 2) the question is whether Petitioner's acquittal of conspiracy to defraud the United States by uttering false invoices to a ration board is a *bar* to his subsequent conviction of aiding and abetting one who uttered the same invoices.

Petitioner specifically conceded that this was not the question (Petition and Brief, p. 20). This misapprehension runs through the Government's whole argument. The Government labors the point that guilt as aider and abettor is different from and does not necessarily flow from conspiracy. Petitioner agrees. One may be an aider and abettor either because he has conspired with his principal or because he has done acts knowingly and with criminal intent which aid and abet that principal or on both grounds. Because of this the Government asserts that acquittal of conspiracy does not necessarily bar a conviction for aiding and abetting. Again petitioner agrees in view of *Pinkerton v. United States*, 328 U. S. 640.

But this does not mean that acquittal of conspiracy has *no* effect thereafter. This question was not involved in the *Pinkerton* case. Previous acquittal of conspiracy does have at least two effects: (1) It *bars* a subsequent conviction of aiding and abetting where such conviction rests solely upon the existence of the conspiracy of which petitioner was previously acquitted. The Pinkerton case inferentially recognized this situation. Mr. Justice Douglas, speaking for the Court, said:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy . . . But as we read this record that is not this case."

But that is precisely the instant case, for the first trial established that Petitioner was not party to the conspiracy. Hence, nothing done in his absence could impose vicarious criminal liability on him. (2) It estops the Government from contending (and the jury from finding) in the subsequent trial that defendant is guilty of aiding and abetting on the basis of the same conspiracy even though there is other evidence from which guilt could be inferred independent of that conspiracy.

The Government says:

> "In the instant case, even if it may be assumed that the jury's verdict in the prior case was susceptible of no other interpretation than that they found that petitioner did not conspire with the Greenbergs, a matter not free from doubt under the record in that case (supra, pp. 7-8), . . ."

But it is submitted there is no doubt whatever on this point. The Government on pp. 7-8 of its Brief, referred to in the above quotation, attempts to show that there was some lack of clarity in the trial judge's instructions at the first trial. Even if that is so it is of no consequence.

The verdict settled the charge made by the indictment. And it is beyond doubt, and the Government has conceded, that the conspiracy charged was a conspiracy to do the very acts which the substantive indictment charged were done. The judgment of acquittal cannot be impeached *by the prosecution* on an asserted inaccuracy in the charge. It is not open to the prosecution to comb the record of the conspiracy trial in an attempt to demonstrate that that trial settled nothing. To permit this would be to allow a collateral appeal where a direct one is forbidden. The Government's Brief recognizes the validity of this position. On page 10 appears this statement:

> ". . . it is clear that the Government was not seeking in the present case, as in Pinkerton v. United States, 328 U. S. 640, 645, to impose responsibility upon petitioner for the Greenbergs' offenses upon a conspiratorial basis. If that had been so the verdict of acquittal of conspiracy with the Greenbergs would presumably, by virtue of the doctrine of res judicata, have been fatal to the conviction of petitioner for the Greenbergs' crimes."

The Government then argues that in the present case there *is* evidence which sustains the petitioner's conviction even if the conspiracy theory is disregarded. Petitioner thinks not; but even if petitioner is wrong in this, his position is no less valid. Throughout its Brief the Government gives lip service to the words "res judicata" but argues as though the fundamental principle embodied in them is identical with either double jeopardy or former acquittal. This, in Petitioner's submission, is the root of the misconception of the case in the trial court, in the Circuit Court of Appeals and in the Government's present position.

In support of its contention the Government says (p. 11) that:

> "The letter of March 3, 1943 (supra, pp. 4-5), was itself clearly a sufficient act of aid and assistance, for it assured the Greenbergs of petitioner's cooperation, and served as a 'cover-up' in case their fraudulent sugar replacement applications should be questioned by the O. P. A."

But a reading of the letter will amply demonstrate that on its face it is clearly insufficient to show that it was a "cover-up." It is by reference to the testimony of an antecedent agreement or conspiracy between Greenberg and Sealfon as to this letter and the purpose of its writing that the petitioner can be tied in as an aider and abettor. But, again, even if petitioner is wrong in this he is certainly right in saying that the Government relied throughout the trial, as did the trial judge in his charge, on the alleged "corrupt deal" (R. 141-146), "arrangement" (R. 142, 150, 151, 152, 154, 186, 209), the "plan" (R. 529, 530) to show guilt of aiding and abetting.

After drawing distinctions between conspiracy and aiding and abetting which would have compelled the despairing admiration of a scholastic philosopher, the Government says (Brief, p. 11):

> "In none of these aspects of aiding and abetting did the guilt of petitioner depend in any respect upon the existence of a conspiracy between him and the Greenbergs, and the charge to the jury was appropriately devoid of any instructions on conspiracy law."

If this is so it certainly is odd that the Government prosecutor throughout the trial used the words "deal", "arrangement", "plan" and although the court may not have used the word "conspiracy" in the instructions, it is clear that that was the theory upon which the issue was submitted. Speaking of the alleged conversation between Greenberg and petitioner the court said that this "discussion which was had between Greenberg and Sealfon is

the crux of this situation" (R. 550). The Government *now* says that in relying upon these discussions it was relying not upon a conspiracy but upon "arrangements"! (Brief, p. 12).

Again, distinguishing conspiracy and aiding and abetting, the Government says (Brief, p. 12) "The two concepts equally result in responsibility for substantive crime (cf. *Pinkerton v. United States*, supra), but each depends upon different factors." Since this is so why was not the one factor, to wit, conspiracy, entirely eliminated from the trial of the substantive crime by reason of the former acquittal? Even if the Government is correct in saying that the evidence justified conviction either because of conspiracy *or* acts of assistance, nevertheless the former had to be eliminated as a factor in the second trial because of the result of the first.

It is universally recognized that a conviction which rests upon alternative grounds, one valid and the other invalid, cannot stand. An appellate court is unable to determine upon which ground the jury based its verdict. As this Court stated in *Kotteakos v. United States*, 328 U. S. 750, 765:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

II.

For some reason the Government, in its opposition Brief, has taken no notice of that part of petitioner's argument (commencing at p. 24) to the effect that petitioner was denied the right of producing evidence in his own behalf. The importance of this question is indeed emphasized by the Government's Brief in opposition.

If it be true, as the Government contends, that petitioner's guilt could be predicated either upon conspiracy

or upon acts of assistance, then certainly it was his right to prove by any proper evidence, oral or documentary, that at least he was not party to a conspiracy. Evidence is not inadmissible because it does not constitute a defense to the whole of the charge. It seems to petitioner that the refusal of the court to permit him to prove by record proof that he had not entered into any agreement with Greenberg as to which it had submitted evidence, is a particularly aggravated violation of the right which belongs to everyone subject to our Constitution of producing competent evidence in his own behalf.

Petitioner repeats that his position on this score is equally valid whether the Government relied upon, and had the right to rely upon, the theory of conspiracy alone or upon both conspiracy and acts of aiding and abetting.

Respectfully submitted,

ROBERT T. MCCRACKEN,
LEMUEL B. SCHOFIELD,
THOMAS D. MCBRIDE,
Counsel for Petitioner.

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No. 174

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT SEALFON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

JOHN J. WILSON
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INDEX

	Page
ARGUMENT	1
APPENDIX A—Conspiracy Indictment	9
APPENDIX B—Excerpts from final argument of District Attorney in Conspiracy Trial	19
APPENDIX C—	
(1) Defendant's requests to charge in conspiracy trial	24
(2) Charge of the Court in conspiracy trial	26

CASES CITED

Fall v. United States 60 App. D. C. 124; 49 F. (2d) 506 7

United States v. Adams, 281 U. S. 202 3, 6

United States v. Bayer, 331 U. S. 5 5

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REPLY BRIEF FOR THE PETITIONER

I

The indictment upon which the petitioner was first tried and acquitted charged a conspiracy among the petitioner, Fresh Grown Preserve Corporation, its officers, Leo and Murray Greenberg, S. J. Baron Corporation, Royal Crown Bottling Company of Baltimore, Inc., Royal Crown Bottling Company of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. As an

overt act alleged to have been committed "in pursuance of, and in order to effect the objects of the said conspiracy", it was charged that "on or about the 3rd day of March, in the year 1943" the petitioner "did deliver to the Fresh Grown Preserve Corp., N. J., a letter signed Sero Syrup Company, Robert Sealfon, naming the agencies to which sugar and sugar syrups delivered to said Sero Syrup Company was destined". (App. A, *infra*, p. 14). Of the defendants named in this indictment, Fresh Grown and the Greenbergs pleaded guilty, and the S. J. Baron Corporation pleaded nolo contendere (R. 571). At the trial the court directed a verdict of acquittal as to the Royal Crown companies and their president (Tr. 377-424, 436-438, 563; Respondent's Brief pp. 5, 6). The case against the petitioner was therefore the only case submitted to the jury.

It is obvious that as a matter of law the jury was bound to return a verdict of guilty if the government on the trial of the conspiracy indictment established three facts: (1) that there was a corrupt agreement between the petitioner and the Greenbergs, (2) that the petitioner wrote the letter of March 3, 1943, and (3) that he wrote this letter pursuant to the corrupt agreement. In other words it was necessary for the government to prove only that the petitioner conspired with one of the codefendants, and that one overt act was committed pursuant to such conspiracy. The verdict of acquittal, therefore, meant that the government had failed to establish at least one of the three facts which would have compelled a finding of guilt by the jury.[1]

Each of the three facts, which were vital to the government's case at the first trial, was an essential link in the government's proof at the second trial. If one of these facts was negatived by the finding of not guilty then the

[1] The respondent concedes that the verdict of acquittal could not have been based on the failure of the jury to find that the letter of March 3, 1943, was written (Respondent's Brief, p. 33); hence the inescapable conclusion is that the jury found either that no conspiracy had been established, or that the letter of March 3 was not shown to have been written pursuant to a conspiracy.

second prosecution necessarily collapsed. The respondent in its brief (pp. 22, 23) attempts to escape the logic of this situation and to avoid the fatal consequences of the application of the principle of collateral estoppel, by the argument that

> the record of the first trial reveals that the verdict of acquittal does not, as petitioner contends, necessarily constitute a finding that petitioner had not entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d. The entire trial for conspiracy was predicated on the theory that petitioner was a party to a general over-all conspiracy involving, ultimately, petitioner, the Greenbergs, and the Baron Corporation, and the jury was never definitely or even impliedly told that petitioner could be convicted if he was not part of the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater possibility, that the jury was impelled to return a verdict of acquittal on a finding that petitioner was not a party to the over-all fraud as on a finding that petitioner did not write the March 3d letter pursuant to a corrupt agreement with the Greenbergs. Hence the verdict of acquittal at the first trial can be taken as establishing only that the whole offense submitted to the jury was not proved, i.e., that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and the Baron Corporation. It is not a finding as to any particular ground which may or may not have influenced the jury to reach that ultimate conclusion. *United States* v. *Adams*, 281 U. S. 202, 205. Hence, the verdict is not a finding that petitioner had not entered into a corrupt agreement with the Greenbergs.

Thus the respondent has rested its case upon the narrow proposition that the circumstances of the conspiracy trial make the doctrine of collateral estoppel inapplicable; that the verdict of acquittal meant *only* that the government had failed to establish that the petitioner had conspired

with *all* of the codefendants. Upon this position and theory the respondent must stand or fall. We think it clear that the respondent's argument is fallacious.

In the first place, the respondent's argument is based upon the premise that the conspiracy case was improperly argued by the district attorney and wrongly submitted to the jury by the trial judge. We submit that this proposition is untenable on its face. As we have said it must be conceded by the respondent that as a matter of law the jury was bound to convict if the government established the existence of a conspiracy or agreement between the petitioner and the Greenbergs, and established that the letter of March 3 was written pursuant to that agreement. The respondent's argument, that the case was submitted to the jury in violation of these correct principles of law, is based upon speculation and upon inference tortured from the arguments of counsel and the charge of the trial judge. We submit that no such strained interpretation of the arguments and the charge can demonstrate that counsel and the trial court and jury failed in their plain duty.

The record of the conspiracy trial affirmatively shows however that it was understood by counsel and by the court that a conviction must follow, if the jury found that there had been a conspiracy between the petitioner and the Greenbergs followed by an overt act in furtherance of that conspiracy; and the record also shows that this understanding was plainly conveyed to the jury. The argument of the prosecutor, from which we have quoted at length in Appendix B, *infra*, pp. 19-23 (Tr. pp. 546 *et seq.*) was based upon this theory; he attempted only to convince the jury that the petitioner had conspired with the Greenbergs, and had written the letter of March 3 pursuant to that conspiracy. He referred to the participation of the S. J. Baron Company only as evidence tending to show the nature of the alleged plan (App. B, p. 22, 23). Similarly with respect to the Baron Company, counsel for the petitioner argued only that as an evidentiary matter the peti-

tioner could not be charged with the acts of Baron, since there was no connection between the petitioner and Baron; that the petitioner dealt only with the Greenbergs, and that these dealings were not corrupt on the part of petitioner. Moreover the court on at least three occasions in his charge emphasized that it was necessary for the government to prove only that there had been a corrupt agreement or understanding between "two or more persons", followed by an overt act (App. C, pp. 27, 28, 29; Tr. pp. 562, 564, 565). Nowhere in the court's charge was there any suggestion that the jury was required to find an "over-all conspiracy", that is a conspiracy involving the petitioner and all of the codefendants. The court's theory of the case in this connection was clearly shown by his statement that he had "covered the second charge" requested by the petitioner (Tr. 576; App. C, p. 37). That charge was as follows (Tr. 584; App. B, p. 24):

> The defendant must be acquitted unless the Jury find beyond a reasonable doubt that he entered into a combination or agreement with Greenberg or Fresh Grown Preserve Corp., N. J. to defraud the Rutherford Ration Board and to induce the Board to issue sugar replacement certificates, on the presentation of false and fictitious documents.

Finally the court read to the jury the defendant's twelfth requested charge as follows (Tr. 578, 586; App. C, p. 39):

> If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

The fact that the court did not amplify and labor the point, that proof of an "over-all conspiracy" was unnecessary, does not justify the conclusion that the jury was incorrectly instructed. As this Court said in *United States* v. *Bayer*,

331 U. S. 5, "Once the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion".

II

As we have seen, the respondent's interpretation of the verdict of acquittal in the conspiracy case cannot be sustained. On the contrary that verdict necessarily meant either (1) that no conspiracy or agreement between the petitioner and the Greenbergs had been established, or (2) that the government had failed to prove that the petitioner had written the letter of March 3,[2] or (3) that the letter of March 3 was not shown to have been written pursuant to an agreement or understanding with the Greenbergs. Turning to the second trial of the petitioner we find that the theory of the government's case, upon which it then relied to convict the petitioner as an accessory, was that he had written the letter of March 3, pursuant to an agreement and understanding with the Greenbergs and for the express purpose of enabling them to use that letter, if needed, to show delivery of sugar to an exempt agency (see Respondent's brief p. 43). Failure to establish this theory in its entirety would necessarily have resulted in an acquittal. In other words it was necessary for the government at the trial of the substantive indictment to establish all of the three elements or facts which had been essential to the conviction of the petitioner at the first trial; the absence of any one of these three facts would have been fatal to the government's case at the second trial. And since the existence of at least one of these facts had necessarily been negatived by the verdict of acquittal, it plainly follows that the doctrine of collateral estoppel was applicable to preclude the second conviction.

United States v. *Adams*, 281 U. S. 202, which is relied upon by the respondent, plainly supports the petitioner's

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[2] See footnote 1, page 2 *supra*.

reasoning in the instant case. In that case the Court found an "alternative possible ground" for the former acquittal, and the Court pointed out that a finding of not guilty upon this ground was not fatal to the second prosecution. In the case at bar however a finding of not guilty upon any one of the three alternative possible grounds was necessarily fatal to the second prosecution. A situation similar to that in the *Adams* case existed in *Fall* v. *United States*, 60 App. D. C. 124; 49 F. (2d) 506, cert. den. 283 U. S. 867, where the court found an alternative possible ground for a prior acquittal, which was not inconsistent with a subsequent finding of guilt.

III

We submit that the theory of the respondent's brief, upon which the respondent has rested its case, is clearly fallacious. We think it follows that the respondent's argument must fail and that the decision of the court below must be reversed.

Respectfully submitted,

JOHN J. WILSON
ROGER ROBB
Attorneys for Petitioner

APPENDIX A

Conspiracy Indictment.

UNITED STATES OF AMERICA, District of New Jersey, ss:

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1945.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

(1) That on all of the days and dates hereinafter mentioned there was established, set up and organized and existing and acting at Rutherford, Bergen County, New Jersey, in accordance with law, a certain board or body, an agency of the United States, known and designated as War Price and Rationing Board No. 24.2.11, having territorial jurisdiction over certain cities, towns, townships and places in said County, including the Township of Lyndhurst, and having authority over a rationed commodity, to wit, sugar, and exercising authority to issue sugar purchase certificates upon special replacement applications for the replacement of sugar in the making, manufacturing and processing of products containing sugar for persons, firms and corporations and sold and delivered to or upon the orders of United States Maritime Commission, Panama Canal, Coast and Geodetic Survey, Coast Guard, Army, Navy, Civil Aeronautic Authority, National Advisory Commission of Aeronautics, Office of Scientific Research and Development, Army Exchange, Army Exchange Service, Post Exchanges of the Marine Corps, Ship Service Activities of the Navy and Coast Guard, Office of Distribution of War Food Administration, The Traveling Organization and Ship Service Stores of the War Shipping Administration, War Shipping Administration with respect to use as Ship Stores and Canteen Stores on Ocean going vessels,

the American Red Cross with respect to products for consumption by the Armed Forces and medical supplies for allied prisoners of war, the United Stervice Organizations, Inc., for consumption by the armed forces outside the United States and United Seamen's Service Inc., for consumption outside the United States and for export and foreign consumption upon proper export permits, (hereinafter called and referred to as the Exempt Agencies) over and above the fixed quota or sugar base assigned to such persons, firms and corporations;

(2) That on all of the days and dates hereinafter mentioned, Fresh Grown Preserve Corp., N. J., (hereinafter sometimes called and referred to as the Corporation) was a corporation of the State of New Jersey, located at and doing business at said Township of Lyndhurst, and engaged in the business of making, manufacturing and processing jellies, syrups and preserves and imitation jams, jellies, jellies, marmalades and preserves and selling and disposing of the same and having a fixed and established quota or sugar basis for the use and consumption of sugar in its products, and Murray Greenberg was President and Treasurer and Leo Greenberg was Vice President thereof and in full and complete control of all its business activities, transactions and affairs;

(3) That during the period between the 1st day of January, in the year 1943, and the 15th day of April, in the year 1944, and continuously from day to day during such period, at the Township of Lyndhurst, and at Rutherford both in the County of Bergen, State and District of New Jersey and within the jurisdiction of this Court,

FRESH GROWN PRESERVE CORP., N. J.,
a corporation of the State of New Jersey,
MURRAY GREENBERG,
LEO GREENGERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
a corporation of the State of Maryland,

ROYAL CROWN BOTTLING CO. OF WASHINGTON, INC.,
a corporation,
WILLIAM C. FRANKLIN,
S. J. BARON CORPORATION,
a corporation of the State of New York,
and
ROBERT SEALFON,

(hereinafter in this indictment sometimes called and referred to as the defendants), together with others to the Grand Jurors unknown, did, wilfully, knowingly, unlawfully and feloniously, conspire, combine, confederate and agree together to commit offenses against the United States, to wit;

(a) To knowingly, wilfully, unlawfully and feloniously utter and publish as true and cause to be uttered and published as true, to and upon the said Board, falsely made, false, forged and counterfeited writings purporting to be true and correct copies of invoices for goods sold and delivered to and for such Exempt Agencies or one or more of them, knowing the same to be false, forged and counterfeited,

(b) To knowingly, wilfully, fraudulently, unlawfully and feloniously and for the purpose of defrauding the United States, make and cause to be made to the said Board, an agency of the United States and in matters within its jurisdiction, to wit, the matters of the applications of the said Corporation for the issuance by the said Board of sugar purchase certificates in large amount and claimed by the said defendants to be for replacement of sugar, over and above and fixed quota or sugar base allowed the said Corporation, claimed to have been used and expended by the said Corporation in the making, manufacturing and processing of products sold and delivered by the said Corporation to and for such or various of the said Exempt Agencies, false and fraudulent statements and representations;

(c) To defraud the United States in its governmental function of conserving and rationing sugar fairly and equi-

tably among such Exempt Agencies, manufacturers and producers of products containing sugar and the public generally, by applying to the said Board for the issuance to the said Corporation of sugar purchase certificates in large amounts, in all to the amount of 25,000,000 pounds and upward, over and above its fixed quota or sugar base, and fraudulently and falsely pretending and representing that the said certificates asked for in its application was for sugar replacement actually used and expended by said Corporation in the making and processing of products actually sold and delivered for and to and for the use of Exempt Agencies, and to make and file with said Board, for the purpose of deceiving the said Board and to induce the said Board to issue such certificates to the said Corporation, false, fraudulent, fictitious, forged and counterfeited statements, papers and writings purporting to show, state and declare that the sugar purchase certificates applied for were for actual replacement and the products named in the same had been sold and delivered to, for and for the use of Exempt Agencies, when in fact the same had not been sold or delivered to, for or for the use of any Exempt Agency but converted and to be converted by the said defendants for their own use and benefit without regard to any Exempt Agencies, the said defendants knowing the said statements, papers and writings to be false, fraudulent, fictitious, forged and counterfeited and intending thereby to defraud the United States;

(4) And the said defendants planned, intended and designed, and it was part and parcel of the said conspiracy that the said Corporation would ship and deliver to others of the said conspirators, large amounts of sugar and sugar containing products for the exclusive use of the said other conspirators for a price and for sale or sale after further processing the same to whom they might respectively choose and for their respective use and benefit and not, except in small amounts and quantities, if any, and on rare occasions to any Exempt Agency, that the said

Corporation would use all the sugar purchase certificates is was able to obtain from the said Board and to which it was not justly entitled for and in the purchase of sugar from refineries and others and the amounts so obtained, in the form received from the refineries or as sugar products, would ship and deliver to others of the said defendants for sale and disposal to baking companies and other manufacturers of food products, beverages and other articles for disposal to the general public, that in order to deceive the United States and the Office of Price Administration, the officers, agents, investigators and employees thereof, from discovering the true and ultimate destination of the sugar so obtained upon the said sugar purchase certificates, the said defendants would keep and maintain false, fictitious and fraudulent records and books of accounts regarding their transactions in the shipment and delivery of sugar and sugar products between the said defendants, and the said defendants, Royal Crown Bottling Co. of Baltimore, Inc., Robert Sealfon, (using the name Sero Syrup Co., a name adopted and used by the said Robert Sealfon in his business) and S. J. Baron Corporation, would write, send, transmit and deliver to the said Corporation, letters and communications indicating that their principal business in the sale of sugar and sugar products was with the sale and delivery to Exempt Agencies, when in fact, very little, if any, of such business was with any such Exempt Agency;

(5) And it was further part and parcel of the said conspiracy, that in connection with applications of the said Corporation for sugar purchase certificates, it would be falsely and fraudulently shown, stated and declared to the said Board that the said Corporation had used and expended large quantities of sugar in the manufacturing and processing of certain products sold and delivered to various persons, firms and corporations for export to and consumption in foreign countries, when in fact, as the said defendants well knew, the said products had not been so sold and delivered to the persons; firms and corporations named and

had been otherwise sold and disposed of by the said defendants;

(6) The said defendants thereby designing to procure large amounts of sugar running into millions of pounds, to which they were in no way justly entitled, by false, fictitious, fraudulent statements and representations and by false, forged and counterfeited papers and writings, and thereby to cheat and defraud the United States as aforesaid.

OVERT ACTS.

And in pursuance of and in order to effect the objects of the said conspiracy, all at the County of Bergen, in the State and District of New Jersey and within the jurisdiction of this Court, certain of the said defendants, at the times and places hereinafter mentioned in connection with their respective names, did do and perform the following overt acts, to wit,

(1) On or about the 29th day of March in the year 1943, at Lyndhurst, the said

S. J. BARON CORPORATION

did deliver to the Fresh Grown Preserve Corp., N. J., a letter naming the agencies to which sugar shipped and delivered to them was destined;

(2) On or about the 15th day of April, in the year 1943, at Lyndhurst, the said

WILLIAM C. FRANKLIN

did deliver to the Fresh Grown Preserve Corp., N. J., a letter naming the agencies to which sugar delivered to Royal Crown Bottling Co. of Baltimore, Inc., was destined;

(3) On or about the 3rd day of March, in the year 1943, at Lyndhurst, the said

ROBERT SEALFON

did deliver to the Fresh Grown Preserve Corp., N. J., a letter signed Sero Syrup Company, Robert Sealfon, nam-

ing the agencies to which sugar and sugar syrups delivered to said Sero Syrup Company was destined;

(4) On or about the 9th day of February, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and the said

LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for marmalades, jams and jellies alleged to have been sold and delivered to Pavia and Company;

(5) On or about the 1st day of April, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and

LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for goods alleged to have been sold and delivered Joseph Sammos, under the name of Delft Packing Company;

(6) On or about the 1st day of February, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and

LEO GREENBERG

did show and exhibit to the said Board, a false copy of a pretended invoice for products alleged to have been sold to Pan Continental Export Company;

(7) On or about the 4th day of May, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
and
LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for marmalade alleged to have been sold to Meyer and Lange;

(8) On or about the 18th day of May, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
and
LEO GREENBERG

did show and exhibit to the said Board a false copy of a pretended invoice for marmalade alleged to have been sold to Puretest Products, Inc., at Rutherford;

(9) On or about the 2nd day of February, in the year 1943, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG
and
LEO GREENBERG

did make and cause to be made to the said Board a fraudulent application for the replacement of 54,120 pounds of sugar;

(10) On or about the 13th day of July, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
and
ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 488,773 pounds of sugar;

(11) On or about the 31st day of August, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
WILLIAM C. FRANKLIN

and

ROBERT SEALFON

did make and cause to be made to the said Board, fraudulent application for the replacement of 545,184 pounds of sugar;

(12) On or about the 23rd day of September, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
WILLIAM C. FRANKLIN

and

ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 545,184 pounds of sugar;

(13) On or about the 18th day of February, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board, a fraudulent application for the replacement of 532,125 pounds of sugar;

(14) On or about the 22nd day of March, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 589,985 pounds of sugar;

(15) On or about the 7th day of April, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board, a fraudulent application for the replacement of 624,690 pounds of sugar;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

EDGAR H. ROSSBACH
United States Attorney

APPENDIX B

Excerpts from final argument of District Attorney in conspiracy trial

546 Ladies and gentlemen, the Government set out to prove here that there was a conspiracy and that Sealfon participated in it, and in my offer now to demonstrate to you that that is true, I am not going to distinguish in my comments between the two; that is to say, I am not going to address myself to the first part of it and then to the second, but will deal with both joinly, because I think that that will make the picture clearer. And all that I am going to do is talk about the evidence and try to show you where it fits in. You have a right, first of all, to consider the position in which the Fresh Grown Preserve Company and Robert Sealfon, trading as Sero Syrup Company, found themselves leading up to March 3, 1943, the date on which the letter, the all-important letter was written, and you should consider that for 1942 the Fresh Grown Preserve Company had a basic quota of 2,100,028 pounds, and for 1943, up to April the 11th, when it was cut off by the OPA, the basic quota was 708,925 pounds. Their total basic quota was less than three million for those two years. You have a right to consider also that beginning on January 30th, 1943, the Fresh Grown Preserve Company, through the Greenbergs, originated the practice of filing false papers with the board. I am going to show you an important distinction that exists there, and I am talking about the testimony of Pure Test Products, Inc., Ameri-

547 can-African Export Company, Colonial Stores, Inc., and Pan-Continental Export Company.

I point out to you that with respect to those claims when they were filed with the Rutherford Rationing Board, the Greenbergs indicated in the applications and in the invoices attached that they were for export and there weren't any names of local exempt agencies in those applications or invoices, and that is important, because it wasn't until this

letter came through from Sealfon that the Fresh Grown Preserve Company enlarged their field, enlarged their scope and introduced names of local—and I mean in the United States—exempt agencies, and they are there and you can examine them. They saw that it worked when they did that. And then alongside of it, before we get to talking about the developments of the plan between the two, the negotiation of the plan, let us reflect on the position that Sealfon found himself in prior to March 3, 1943. He had an arrangement before February the 17th with the National Biscuit Company. Citron told you that his first deliveries there were on that date of February 17th and he knew then that whatever sugar he could get in the form of syrup he could sell to them in the form of vanilla syrup, not cherry or root beer or cream or something else which was the final product that went over to this Automatic Canteen Company. There wasn't any vanilla syrup in that; but he had this contract before and Kranski from the time it started, as he testified, was placed and stationed at the office of the Fresh Grown Preserve Company. Why was he there, I don't know the exact date that that started, but he was there as he said, because the National Biscuit Company complained that they weren't getting the right amount, the right quantity of syrup per unit, and Kranski had to stay there to watch that. Those two features of evidence here, ladies and gentlemen, show you the position that Sealfon was in, and show you that he wanted to get as the date of March the 3d, 1943 approached, vanilla syrup to fulfill that contract.

548

He wrote a letter dated March the 3d. Mr. Barshay, quite casually I thought, went over the testimony of Sanford Doctors that he gave here relating to the arrangements for this letter, and what he left out of his statement to you was the fact that Sanford Doctors, when he first talked to Greenberg, had a discussion with him about the scarcity of sugar, and of course everybody knew that, and you have a right to consider a thing like that which you

know from general knowledge and experience. They talked about the scarcity of sugar, and then Greenberg told Sanford Doctors to go to Sealfon and get from Sealfon a letter and to get a letter listing the names of exempt agencies, if there were any, and to get that letter and to tell Sealfon that if he wrote it he, Sealfon could get syrup from Greenberg in larger quantities. Doctors then proceeded to carry
out that mission and went there and obtained the
549 letter, and in it the first name that was mentioned was the Brooklyn Navy Yard, and he told you that the entire message that Greenberg gave to him was limited to Sealfon. He told Sealfon that Greenberg wanted the letter to get more syrup and with it to be able to sell more syrup to Sealfon. Why didn't Sealfon say "Automatic Canteen Company" in this letter if he were in such good faith instead of saying "Brooklyn Navy Yard"?

. . . . . .

The letter was turned in, sent by Sero Syrup to the Greenbergs. We don't have to prove that this letter was
exhibited to the local OPA board; that has been sug-
550 gested here too. That wasn't the plan at all, and Sealfon, you must infer from the facts, didn't care how the thing was accomplished so long as he got the syrup.

. . . . . .

551 Now, after the letter was written and delivered and the names were used, 596 invoices were submitted—and if you want to take the trouble to look at them you will see that all 596 called for deliveries of vanilla syrup, and you know that 98 per cent of that amount, which was 9,924,740 pounds, went to private customers of Sealfon—rather to the National Biscuit Company, and 2 per
cent, the 2 per cent remaining, to private customers
552 of Sealfon's. And, referring again for a moment to the letter, let me call to your attention that in his desire to make you think that Sealfon had in mind something besides his agreement with the National Biscuit

Company when he sent these through, counsel has said they had reference to our sales, and there weren't any such things as "our sales" of vanilla syrup.

Now, ladies and gentlemen, in presenting this case, the Government has introduced evidence concerning the participation of the S. J. Baron Company. The letter that the Baron Company wrote was on March the 29th, somewhat later than the Sealfon letter, and I wish to make it clear to you that in talking about the Baron Company's participation, or in presenting evidence here relating to it, we do not ask you to find Sealfon guilty because Baron was guilty. No such thing. We ask you to consider the evidence introduced about the Baron participation in order to show you that there was a conspiracy and what the plan was and how it operated; and if you look at the letter of March the 29th you will see that it is not very much different than the one of March the 3rd which Sealfon wrote. And if you look at the two of them you will see that there was considerable effort to couch in certain language what they wanted to say so as to protect themselves if they could. You heard about the negotiations for the Baron letter from Martin Lowenthal, who testified here that he operates the Lewis Martin Company Food Brokerage in New
553 York, and his testimony, just like the testimony of Sanford Doctors, is not contradicted in this case. He told you, just as Doctors did, that the Greenbergs talked to him about the proposed letter and sent him to Sol. J. Baron to get it and told him to tell Sol J. Baron to list the names of exempt agencies in this letter, and just as Doctors testified, Lowenthal also said that the instructions from Greenberg were to do this, obtain this letter, so that the Greenbergs could get more sugar and in turn sell more syrup to the Baron Corporation. And there again is the pattern and the plan of this conspiracy, and it makes no difference whatever, ladies and gentlemen, whether the Baron Corporation ever knew Sealfon or whether Sealfon ever had any transactions of any kind

with that company. Here are the names that are listed; they were read to you before and you will see them. March the 29th was the date of the letter. April the 1st, two days later, was the date of the first application containing one of those names and that April 1st application was accompanied by three invoices listing these names, one or more of them, and they were dated February 12, February 17 and February 20; and there again is the pattern, and from then on up until some time around July or August of the same year, the Baron Company obtained more and more sugar just as Sealfon did, as a result of this plan.

If you consider the similarity between those two
554 transactions you will see that the plan was there and carried out in the same identical manner.

. . . . . .

559 Analyze the evidence, all of it, and I am convinced that you must come to the conclusion that Sealfon knew what his purpose was when he wrote this letter. He certainly did it voluntarily. He entered into the conspiracy by this act and by his negotiations concerning it, and don't let him talk himself out of it now by any suggestion that he was referring to casual sales to some concession-
560 aire. A concessionaire, the name of a concessionaire, wouldn't help Greenberg if Sealfon put it in this letter to get sugar in larger quantities so as to sell syrup in larger quantities to Sealfon.

Ladies and gentlemen, I am convinced that if you analyze all of the evidence and look at this letter backwards and forwards and see what was behind it, you are going to have to come to the conclusion that Sealfon is guilty of this charge, and I ask you now in the name of the Government to find him guilty.

APPENDIX C

(1) Defendant's Requests to Charge in Conspiracy Trial

584 1. The fact that the defendant did not testify does not create any presumption against him. By his plea of "not guilty" he denies each and every allegation contained in the indictment.

2. The defendant must be acquitted unless the Jury find beyond a reasonable doubt that he entered into a combination or agreement with Greenberg or Fresh Grown Preserve Corp., N. J. to defraud the Rutherford Ration Board and to induce the Board to issue sugar replacement certificates, on the presentation of false and fictitious documents.

3. If the Jury should entertain a reasonable doubt that this defendant did not know that either Greenberg or Fresh Grown Preserve Corp. N. J. would or did present false and fictitious documents to the Rutherford Ration Board, for the purpose of obtaining sugar ration certificates, then they must acquit the defendant.

4. If the Jury should entertain a reasonable doubt that this defendant did knowingly aid, abet or counsel either Greenberg or Fresh Grown Preserve Corp. N. J., in the preparation or presentation of the false and fictitious documents, then they must acquit the defendant.

5. If the Jury entertain a reasonable doubt that the letter sent by this defendant on March 3, 1944, was intended to induce the Rutherford Ration Board to issue sugar
585 replacement certificates, then they must acquit the defendant.

6. In order to connect this defendant with the alleged crime, the Jury must be satisfied beyond a reasonable doubt that such connection is established by act, conduct or declaration of this defendant only, independent of any declaration or act of others.

7. The case against the defendant is based upon what is known in law as "circumstantial evidence." Such evidence is insufficient as a matter of law if it is equally consistent with either innocence or guilt, and unless the evidence points solely beyond a reasonable doubt to the guilt of the defendant and excludes innocence to a moral certainty, then the defendant must be acquitted.

8. The burden rests upon the prosecution to establish every essential element of the offense charged against this defendant, and every such essential element must be proven to a moral certainty and beyond a reasonable doubt. If any one of the essential elements of the offense is not proven to a moral certainty and beyond a reasonable doubt, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any such essential element of the offense, to a moral certainty and beyond a reasonable doubt, the Jury must acquit the defendant.

9. Mere suspicion or even mere probabilities are not sufficient to warrant a conviction. Suspicion is not a substitute for proof. If the substantial testimony in the
586 case merely establishes a train of suspicious circumstances or probabilities, the defendant must be acquitted.

10. The Court has no opinion and expresses no opinion as to the guilt or innocence of the defendant, and that if during the trial the Jury might have inferred, by reason of the Court's rulings or expressions, that he did possess such an opinion, they must exclude it from their consideration and dismiss it from their minds as being wholly unfounded.

11. If the Jury believes that the evidence is consistent with innocence as well as guilt, the defendant must be acquitted.

12. If upon a consideration of all of the evidence the Jury entertain a reasonable doubt as to whether this defendant conspired or invited or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corp. N. J. or either of them, to commit the crime charged, then the defendant must be acquitted.

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561 **(2) Charge of the Court in Conspiracy Trial**

Newark, N. J., Thursday, December 19, 1945.

[Trial resumed pursuant to adjournment.]

[Appearances as before noted.]

The Court: Before I charge you, ladies and gentlemen of the jury, I desire to say that counsel for the defendant Sealfon made a motion to strike from the record certain testimony which was given by the witness Citron, and the testimony which he referred to I shall read to you. In response to a question, Mr. Citron said:

"Well, at that time, the way I was questioned, my impression was that if Mr. Leo Greenberg or Murray Greenberg knew of an existing purchase order they maybe wouldn't give me the syrup, I didn't know, and I was looking for the business more than anything else."

That is the thing you objected to..

Mr. Barshay: Yes, your Honor.

The Court: And I have granted counsel's motion to strike that from the record.

Now, striking testimony from the record means that the jury is not to consider it in any way. It is sometimes difficult to remember that such testimony has been stricken but I am telling you now that it has been stricken on motion of the defendant, and you are not to pay any attention to that particular tesimony given by Citron.

That, I think, takes care of that particular motion.

562 [The Court thereupon charged the jury as follows:]

THE COURT: Ladies and gentlemen of the jury, the Grand Jury of the United States in and for the District of New Jersey has returned an indictment against the Fresh Grown Preserve Corporation, New Jersey, Murray Greenberg, Leo Greenberg, Royal Crown Bottling Company of Baltimore, Inc., Royal Crown Bottling Company of Washington, Inc., William C. Franklin, S. J. Baron Corporation, and Robert Sealfon, charging them with conspiracy to defraud the United States and to commit offenses under Sections 72 and 80 of Title 18 of the United States Code Annotated.

The basic and fundamental charge in this indictment is conspiracy, and conspiracy has been denounced as an offense in the following language:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided for in the same statute.

The two provisions of the Code which are referred to have to do with the making, forging, counterfeiting, or altering of bonds, bids, or public records, and transmitting such papers and presenting false claims and aiding in obtaining payment thereof.

563 At this time I shall say that because of actions heretofore taken, the Fresh Grown Preserve Corporation is not now on trial, nor is Murray Greenberg nor Leo Greenberg. At the end of the Government's case counsel for both Royal Crown Bottling Companies and William C. Franklin made a motion for a direction of verdict of acquittal and that motion was granted, and I direct you now to return a verdict of not guilty so far as the Royal Crown Bottling Company of Baltimore and the Royal Crown Bottling Company of Washington and William C. Franklin are concerned. The S. J. Baron Corporation is not presently on trial; so that the only remain-

ing defendant is Robert Sealfon. It was brought out during the course of the trial that the other defendants had pleaded. That, of course, must not weigh with you in any degree in determining the question of the guilt or innocence of Robert Sealfon; nor must the action taken by the Court so far as the other defendants who were on trial are concerned affect your deliberations.

Now, the mere fact that an indictment has been returned does not mean that you must consider the return of the indictment as evidence of any wrongdoing on the part of this defendant Sealfon. An indictment is not in any sense to be regarded by you as evidence. It is simply the formulation of a charge which is made against an individual in order that that individual may be apprised of the acusation made against him. It is not evidence and must
564 not be considered by you in any sense as evidence against this defendant. Sometimes people feel, "Well, an indictment wouldn't be returned unless there were some guilt; and where there is smoke there is fire." That is not true. So that so far as the indictment is concerned, when you take it with you to the jury room it will be simply for the purpose of informing you of the nature of the charge made against Sealfon, and the fact that it was returned must not in any way affect you adversely to the interest of this defendant Sealfon. I trust that is very clear to you.

The charge, as I have told you, is a charge of conspiracy, and it may be well now to consider what conspiracy is in order that you may know that with which this defendant is charged.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful object, or some purpose not in itself criminal, by criminal or unlawful means. Now, the gist of the offense is the combination or agreement to effect an unlawful end, and the offense is completed only on some one or more of the parties doing an act to effect the object of the conspiracy.

This is called an overt act; and in order to bring the conspiracy within the ambit of the statute, an overt act done by some member of the conspiracy must be found to have been done before the conspiracy would become illegal; because conspiracy itself, joining and combining, is not
565 enough; there must be some act done to further the object of that conspiracy before the statute would become effective.

The elements of a conspiracy are, first, an object to be accomplished, which must be either the commission of an offense against the United States or the commission of an offense to defraud the United States; secondly, a plan or scheme embodying the means to accomplish the object; thirdly, an agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means agreed upon; and, fourth, as I have said, an overt act by one or more of the conspirators, to effect the object of the conspiracy.

Now, there are certain considerations in respect to what a conspiracy means, and what is necessary for you to find before you could properly say that there was a conspiracy and that this defendant participated in it; and I shall stress those in different ways from time to time in order that you may get a complete and comprehensive idea of the nature of the charge which is made against this defendant. You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if you should find that there was no conspiracy, that would end the matter completely.
566 In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will

apply. I shall refer to those rules and when I refer to them you must keep in mind that they apply only if you find a conspiracy existed and that this defendant was a member of such conspiracy and that he conspired with others named in the indictment to attain the ends set forth in the indictment.

It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite. Of course, entry into the conspiracy may be made after its initiation, provided the person who entered it after it was formed had knowledge of its aim and had an intent to participate in the common agreement and to forward its design. Mere knowledge of the existence of a conspiracy, or even acquiescence in or approval of its ends and aims, without cooperation or agreement to cooperate, is not sufficient to make one a conspirator to commit the act. Whether the conspiracy was successful or not, of course, is not material, because its actual success or failure is of no moment provided the conspiracy was formed, joined in by the accused, and that an act was done in furtherance of the object of the conspiracy.

567 I have told you that it is necessary that a common purpose be shown, a purpose to effect something, some end or aim, which purpose is common to all. Now, how that may be shown is a matter to be determined from the evidence. It may, of course, be inferred where the parties concerned are pursuing the same object and adopt means leading to the same unlawful result. It is not necessary that all of the alleged conspirators know all and each of the other alleged co-conspirators, or be acquainted with them. It is not necessary that there be direct evidence of a formal agreement, but it is sufficient if the evidence of the separate details of the transaction as it was carried out indicate with requisite certainty the existence of a pre-concerted plan or purpose. If proven, however, by circum-

stantial evidence, the circumstances must be of such a character as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged. And I might say now that in the course of summation, counsel may have made inexact or inaccurate statements, but the comments and remarks of counsel are not evidence. Counsel address you in an attempt to assist you to sift and weigh and appraise the evidence, but what they say themselves is not evidence and must not be considered by you as evidence, and if they make statements which differ from the testimony as you recall it, it is your recollection which must prevail and not any statement made by counsel.

568 It is a rule of law that the acts and admissions of co-conspirators which are done or made in furtherance of the object of the conspiracy are admissible against all of the conspirators, but before you may take the act or admission of any alleged conspirator and use it against any other alleged co-conspirator, you must find first of all that a conspiracy exists and that these parties were members of that conspiracy, that they had entered into a common agreement to effectuate the illegal object. But if you do find that, then the rule of law is that the acts and admissions of co-conspirators are chargeable to other members of the conspiracy.

All members of the conspiracy need not know all of the acts done by any other member in order to effectuate the end of the conspiracy. It is enough that they have the common purpose, that they entered into the common agreement to effectuate the illegal purpose, and that they were members of the conspiracy; because they are held to be responsibl for the acts of co-conspirators done in furtherance of the conspiracy, provided you find the conspiracy exists and that this defendant and the persons whose acts are in question are members of this conspiracy.

There must, of course, be intent on the part of the defendant as well as knowledge. There must be intent to defraud the United States or to commit a violation of the laws

of the United States; and as I have indicated to you,
569 mere knowledge that such is being done isn't sufficient; in addition to that, there must be actual participation.

Now, conspiracies and combinations are seldom able to be proven by the production of formal agreements. Ordinarily, conspirators don't sit down and write out the terms of what they are going to do, or the illegal activities they intend to engage in; they don't work that way, ordinarily. But you may consider all of the circumstances; and all of the facts and circumstances must be considered which are connected with this alleged conspiracy, and if they indicate the existence of the preconcerted plan and purpose, it will be sufficient to sustain a verdict, provided there is requisite certainty.

I shall repeat to you that the common design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned in so far as the objects of the conspiracy are concerned.

I think, ladies and gentlemen of the jury, that I have included with fair comprehension that which you should know about the nature of the crime of conspiracy, but that, of course, does not exhaust the situation so far as this case is concerned. There are other rules of law which you must keep in mind and I shall give them to you as they occur to me.

One of the prime and principal and basic elements
570 of our jurisprudence is what is known as the presumption of innocence of the accused. Every person charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence is not just an idle phrase; it is an active protection which remains with the defendant throughout the course of the trial and a protection which may be taken

from him only should you be satisfied from the evidence beyond a reasonable doubt of his guilt. It is a mantle that enshrouds him always, at this very moment, right up to the time when your verdict is returned. And, as I say, it is not just a pretty phrase; it is a real, vital, fundamental right of this defendant, and you must always be conscious of that.

The burden of proving the guilt of the defendant beyond a reasonable doubt is upon the Government and that burden never shifts; not at any time is it requisite that the defendant affirmatively prove himself not guilty. And that that is a sage and wise provision which our founding fathers found to be all important may be easily realized when you think of how simple it is to charge a man with an offense and how difficult it is at times to meet that accusation; sometimes it is impossible. Therefore, realizing that a part of our jurisprudence insists that the Government, the charging party, bear the burden of proving the guilt of the accused beyond a reasonable doubt, and that burden never for a moment shifts.

I have used the term "reasonable doubt." Now,
571 that is a self-explanatory term, but for some reason or other it is not too easy of definition. It is the doubt of a human mind functioning normally and rationally, a doubt begotten from consideration of the evidence, with your minds working as they do in the ordinary, normal processes of life. A reasonable doubt may be said to exist if you cannot say, after consideration and comparison of all the evidence, that you have an abiding conviction to a moral certainty of the truth of the charge; and if you have any such reasonable doubt, that doubt must be resolved in conscience and in law in favor of the defendant. But the defendant is entitled to the benefit only of a reasonable doubt. He is not entitled to the benefit of any remote or hazy, fantastic doubt; he is not entitled to the benefit of a doubt which might be begotten of your unwillingness to convict a fellow human being, or of a doubt which might be based upon your fear that conceivably you might make a

mistake; because you are not to be fearful, you are to be courageous in meeting the obligation placed upon you. So that while the defendant is entitled to the benefit of a reasonable doubt, that's the only type of doubt to the benefit of which he is entitled.

The evidence which has been brought out here is to a very great extent circumstantial. Now, circumstantial evidence is good and valid evidence. Sometimes people say, "Well, you can't convict on circumstantial evi-
572 dence," That is not true. Circumstantial evidence must be considered by you, and it may, provided it meets with all of the requirements, properly be the basis of a conviction, should you be satisfied from it beyond a reasonable doubt that the defendant is guilty. But it must constitute an unbroken chain, leading ineluctably to the conclusion that the defendant is guilty. If from that circumstantial evidence you may draw a hypothesis which is consistent with innocence as well as consistent with guilt, you must give the defendant the benefit of the hypothesis consistent with innocence. But should the circumstantial evidence permit you to draw an inference only consistent with guilt, then it is satisfactory evidence, it is valid evidence, and you must accept it. Of course, mere suspicions or speculation in possibilities or probabilities are not a proper basis for a determination on your part. To suspect a man into jail would be a horrible miscarriage of justice. And so don't guess or speculate. Examine the evidence, weigh it, and arrive at your conclusion from a consideration of that evidence. Don't guess, speculate; get a factual basis for any determination that you may make. Now, I have told you that from facts as you find them after considering the evidence, you may draw reasonable inferences, but you may not on any inference that you draw, draw another inference. In other words, you can't make an inference the basis for the drawing of another inference. You may
573 draw an inference from facts but you may not infer anything from another inference.

There has been brought out before you testimony as to the good repute of this defendant, and I charge you that that is competent and valid evidence and may very properly be the basis of a reasonable doubt, and should it beget in your mind a reasonable doubt, you must resolve that doubt in favor of the defendant. But you may not take reputation evidence alone and use that as the basis for your findings. The reputation evidence must be weighed with all of the other evidence, and it would not seem logical that reputation evidence should offset completely conclusive evidence of guilt; but it is competent evidence and may be the basis of a reasonable doubt. It is only part of the evidence, however, and must be weighed with all of the other evidence which has been brought out before you.

You ladies and gentlemen are judges of the fact. You are to determine what credibility you will give to any witness who may have appeared before you, and you are to say what weight will be given to testimony as it has been adduced or to evidence as it has been introduced. The whole field of determining factual questions is solely, peculiarly, and exclusively yours. You may ask yourselves if any witness who took the stand had any interest in the outcome, and you may examine their deportment as they testified and ask yourselves whether the testimony as they gave
574 it is worthy of credence; and the whole matter of determining what you will believe, to what degree you will believe it, what importance you will give to testimony, is solely yours, and that is a province which may not be trespassed upon by anybody—not by counsel for the defense, counsel for the Government, or the Court; and if during the course of the trial either counsel or the Court has attempted to recall evidence and that recollection differs from yours, it is your recollection which must prevail because you are supreme in the domain of facts. You will determine the facts from consideration and comparison of the evidence and to those facts as you determine them you will apply the law as the Court gives it to you.

The defendant has seen fit not to take the stand. That is his right, and no inference unfavorable to him may be drawn from the fact that he did not take the stand.

You must, of course, not be swayed by prejudice or bias or by sympathy. You mustn't let anything you may have read about trials of this kind, or situations similar to that which you are weighing, determine you in any way. You are to prescind all you have heard before and determine this case on the evidence as it comes out before you here and on nothing else. It would be manifestly highly unfair to permit prejudice or bias to weigh against this defendant, and it would be equally unfair to permit sympathy to color your verdict. You are to do justice. That's what
575 you are here for. And you cannot do justice if you permit yourselves to be swayed by outside considerations, by emotions which do not belong in your deliberations. So cut away completely from any possible prejudice or bias, just as thoroughly as you cut away from all sympathy; because you are not here to give prejudiced or sympathetic verdicts—you are here to give true and just verdicts.

During the course of the trial the Court made certain rulings, made certain comments, and you are not from that to draw any inferences whatsoever. The Court was passing on questions of law. What I think about this case mustn't weigh with you in the slightest. You don't know what I think about it; and if you did, you must'nt be affected by it in any way; because you are to determine this case—it is not my business to indicate what I feel; and if you have thought that you know how I feel, it doesn't make a particle of difference. You are the jury, you are the judges of the fact, and I am the Judge to give you the law which will apply; and that's all I am here for—to conduct the trial, to see that the amenities are preserved, to see that the rules of evidence are sustained, and to tell you the law which you will apply to the facts as you determine them.

You must, of course, go into the jury room without your minds made up. You must discuss the situation with your fellow jurors. Don't go in with closed minds. You may have an impression, but it is your duty to discuss
576 the situation with your fellow jurors, give them the benefit of what you feel and what you think, and in return to receive from them—not "feel"; I am sorry; not what you feel but what you think from the evidence, and to receive in return the benefit of their consultation and advice, and after you have consulted and advised with your fellow jurors, then each of you must arrive at that conclusion which you feel to be in consonance with truth and justice and with your conscience.

I will say that your verdict may be either guilty, should you be satisfied beyond a reasonable doubt from the evidence adduced at this trial that the defendant is guilty, or not guilty, should you not be so satisfied. There is a third possibility; you may be unable to arrive at a common agreement, because any verdict at which you arrive must be unanimous, and in the event that you are not able to arrive at a verdict, you will so report to the Court.

I have been requested to charge certain rules of law by the defendant.

I have already charged you that the fact that the defendant did not testify does not create any presumption against him. By his plea of not guilty he denies each and every allegation contained in the indictment. I repeat that.

I think I have covered the second charge.

Mr. Barshay: Yes, your Honor, you have.

The Court: The third I refuse to charge in the
577 language requested and believe that I have charged the substance, the basis, of it.

I think I have charged the fourth sufficiently and refuse to charge in the language requested.

I refuse to charge the fifth in the language requested.

The sixth I feel that I have charged, but I will go over the matter again because I have told you certain things that I feel should be ever present in your mind.

"In order to connect this defendant with the alleged crime, the jury must be satisfied beyond a reasonable doubt that such connection is established by act, conduct or declaration of this defendant only, independent of any declaration or act of others."

Except in so far as circumstantial evidence of acts or declarations of his may have been testified to by others, and from which circumstances inferences may logically be drawn of participation.

I think I have charged the seventh sufficiently.

MR. BARSHAY: Yes, your Honor.

THE COURT: I shall say, however, in that regard what I have already said: that the evidence must be sufficient to exclude every reasonable hypothesis but that of guilt before you could convict.

I shall charge the eighth as requested:

"The burden rests upon the prosecution to estab-
578 lish every essential element of the offense charged against this defendant, and every such essential element must be proven to a moral certainty and beyond a reasonable doubt. If any one of the essential elements of the offense is not proven to a moral certainty and beyond a reasonable doubt, or if there remains in the minds of the jurors a reasonable doubt as to whether the prosecution has established any such essential element of the offense, to a moral certainty and beyond a reasonable doubt," then you must acquit.

The ninth I have charged, I believe,—

MR. BARSHAY: Yes, your Honor.

THE COURT: —in language which covers the sense of your request.

The tenth I refuse to charge in the language requested and feel that I have covered it sufficiently.

The eleventh I have charged and recharged—

MR. BARSHAY: Yes, your Honor.

THE COURT: —and, of course, the twelfth:

"If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted."

That I have already charged, but I will repeat it.

579 Now, ladies and gentlemen of the jury, there remains but little for me to say now, except that this case is a very important case. Every criminal case is a very important case so far as the defendant is concerned as well as so far as the Government is concerned; because the results affect both parties to the controversy. You are for this defendant now practically every activity of Government at this time. You represent for him all of the sound and wise protections given to every citizen, to every person in the position of this defendant, and you must be jealous to guard all of his rights. The Government of the United States does not ask you to make a sacrifice of an innocent person to prove its might or its potency. Every innocent person convicted, instead of attesting to the dignity and strength of Government, is a living witness of the weakness of that Government. Therefore, all that the Government of the United States asks in this instance is that you do justice. We don't have to prove the might and power and dignity and majesty of the United States of America. He who runs may read; and to all persons that majesty and dignity are evident. Remember that while unpunished crimes as well as undetected crimes are threats to the continuance of Government, injustice is a greater threat; but remember that the United States itself, while it prosecutes this defendant, insists that you guard his every right, because he is a part of the United States. On the

580 other hand, the United States Government is a party to this suit, and it has a right to demand of you that you be just as jealous of its rights as you are of the rights of the defendant. It insists that you must not sacri-

fice it because of misplaced sympathy. You know, the United States of America is not any remote entity, not any artificial, autocratic and tyrannical thing that oppresses all of us. The United States Government is made up of you and me and a hundred and thirty-seven or a hundred and forty million other people who are trying to live together in amity and peace and under law. That's all it is. And that Government, speaking for all of us, the defendant, the defendant's lawyers, the Government's lawyer, you, the jury, and me, the Judge, and all of our fellow citizens—that Government asks that justice be done between the two parties to this controversy; and unless we can hope for justice in our courts, we might just as well give up, because everything precious and dear to us will become as nothing, and all that has value will become valueless. Therefore do justice in this case. Be concerned about the defendant but only to the extent to which I have outlined his rights. It isn't the case of a great Juggernaut trying to crush a poor person. It is the Government of the United States trying to protect his rights and the rights of everybody else. He doesn't ask or hasn't the right to ask sympathy. He has the right to ask what the Government asks—justice. And he must get that at your
581 hands and the Government must get it at your hands.

These are stirring and troublous times and it is all the more essential now that truth prevail and that right predominate. Find out where truth lies and out of consideration of that truth, so far as you find it to exist in this case, arrive at your verdict; and if you do an unjust thing, you will have stricken a blow against the country we love, unless you do justice. That is a solemn thought. May it ever remain solemn with you.

And in conclusion, ladies and gentlemen of the jury, there is nothing that I can do to outline your duties better than to recall the words of the oath which you took: a true verdict to render according to the evidence, so help you God.

Ladies and gentlemen of the jury, you may take the case.

Swear the bailiffs. I shall discharge now with the thanks of the Court the two alternates.

[The bailiffs were duly sworn.]

THE COURT: Just a minute, please. Mr. Barshay.

[Mr. Barshay stepped to the bench.]

THE COURT: In the presence of the jury but out of their hearing, will you take your exceptions?

MR. BARSHAY: Yes. The defendant respectfully excepts to the Court's refusal to charge in the language as presented in the requests to charge No. 3, No. 4, No. 5. That's all.

THE COURT: All right.

MR. BARSHAY: Thank you.

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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT SEALFON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

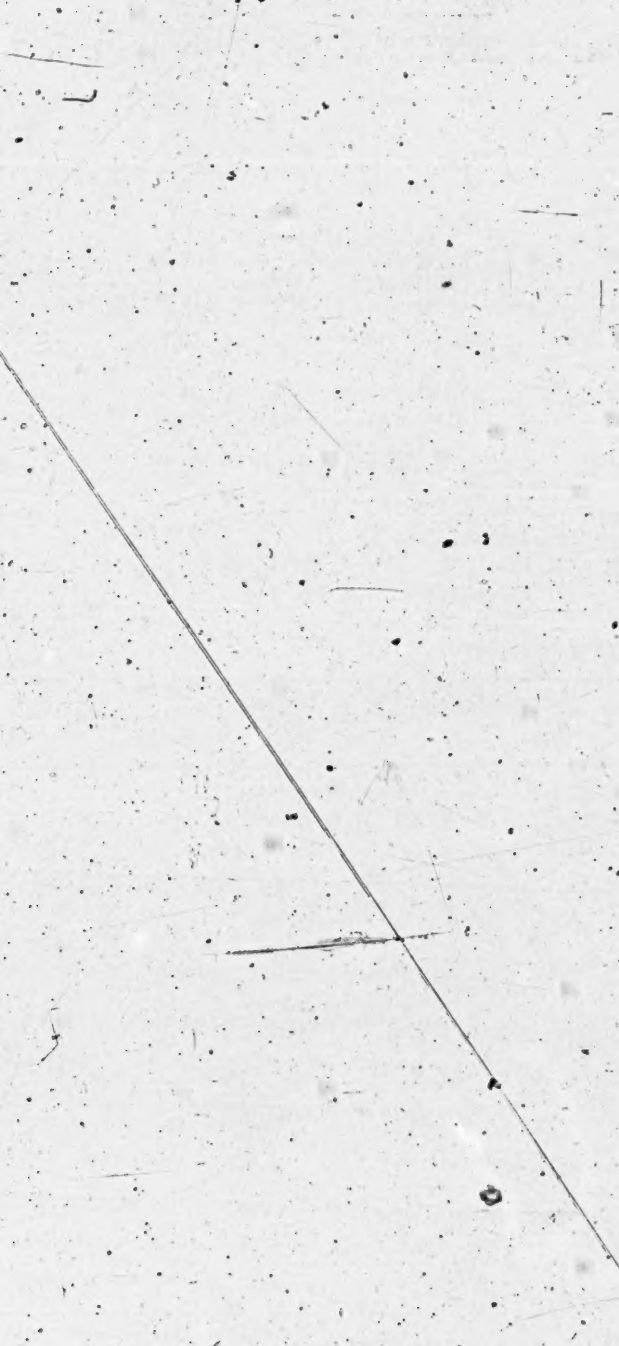
BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	13

CITATIONS

Cases:	
Bozza v. *United States*, 330 U. S. 160	11
Direct Sales Company v. *United States*, 319 U. S. 703	12
Frank v. *Mangum*, 237 U. S. 309	9
Pinkerton v. *United States*, 328 U. S. 640	9, 10, 12
United States v. *Adams*, 281 U. S. 202	9
United States v. *Bayer*, No. 606, October Term 1946, decided June 9, 1947	9
United States v. *De Angelo*, 138 F. 2d 466	9
United States v. *Falcone*, 311 U. S. 205	12
United States v. *McConnell*, 10 F. 2d 977	9
United States v. *Meyerson*, 24 F. 2d 855	9
United States v. *Oppenheimer*, 242 U. S. 85	9
Statutes:	
Criminal Code:	
Section 28 (18 U. S. C. 72)	2
Section 35 (18 U. S. C. 80)	2
18 U. S. C. 550	6, 10



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OPINION BELOW

The opinion of the circuit court of appeals (R. 589–595) is reported at 161 F. 2d 481.

JURISDICTION

The judgment of the circuit court of appeals was entered May 8, 1947 (R. 596). On June 5, 1947, by order of Mr. Justice Burton, the time for filing a petition for a writ of certiorari was extended to July 7, 1947 (R. 598), and the petition was filed July 3, 1947. The jurisdiction of

this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the principle of *res judicata*, petitioner's acquittal of conspiracy to defraud the United States by uttering false invoices to a ration board was a bar to his subsequent conviction of aiding and abetting the uttering of the same invoices.

STATEMENT

On October 2, 1945 (see R. 5), an indictment in twelve counts (R. 8-33) was filed in the District Court for the District of New Jersey, charging that petitioner and Murray Greenberg, Leo Greenberg, and the Fresh Grown Preserve Corporation, on various dates between October 1943 and April 1944, knowingly uttered and caused to be uttered and published as true false writings for the purpose of defrauding the United States, in violation of Sections 28 and 35 of the Criminal Code (18 U. S. C. 72 and 80). Specifically, it was charged that, in order to induce a Local War Price and Rationing Board of Rutherford, New Jersey, to issue sugar purchase certificates to the corporation for the replacement of sugar contained in products allegedly sold and delivered for the use of an "exempt agency" under O. P. A. reg-

ulations,[1] the defendants knowingly uttered and caused to be uttered as true to the board writings purporting to be true copies of invoices for vanilla syrup sold and delivered by the corporation to petitioner for the use of the Brooklyn Navy Yard, whereas in fact the invoices were false in that the syrup was not actually sold to petitioner for resale to the Brooklyn Navy Yard or any other exempt agency. Each count charged a different uttering. The corporation and the two Greenbergs pleaded guilty (R. 5), and petitioner was found guilty on all counts after a jury trial (R. 565–566). Petitioner was sentenced to imprisonment for five years and fined $1,000 on each count, the imprisonment sentences to run concurrently (R. 574). On appeal, the judgment of conviction was affirmed (R. 596).

The Government's evidence was, in brief, as follows:

Petitioner was a manufacturer of and dealer in syrup, operating under the name of Sero Syrup Company (R. 378, 423). In 1942 he had unsuccessfully attempted to obtain from his own ration board, in Brooklyn, New York, sugar replacement certificates for sugar contained in products sold to what were held to be non-exempt agencies (R. 413–416, 421–424).

[1] Under O. P. A. regulations, a manufacturer who sold sugar-containing products directly or indirectly to the Army or Navy, or other "exempt agencies," was entitled to replenish his basic quota of sugar to the extent of the amount of sugar contained in the products thus sold (R. 86–87).

Murray Greenberg, president of the Fresh Grown Preserve Corporation (R. 137), testified that petitioner, a purchaser of syrup from his company (R. 138), expressed a desire in the early part of 1943 to purchase greater quantities of syrup than he was already receiving (R. 138–139). Greenberg told petitioner that the corporation's sugar quota made this impossible (R. 139), but that if petitioner was selling syrup to a "ration-exempt" agency and would write him a letter to that effect, he could sell him additional syrup (R. 140). Petitioner told Greenberg that he was selling syrup to a civilian company located in the Brooklyn Navy Yard and asked "what kind of a deal could he work out" if he wrote Greenberg a letter stating that he "was selling to or at the Brooklyn Navy Yard without mentioning the civilian company, to leave the inference that he was selling the Brooklyn Navy Yard" (R. 140–141). Petitioner required that, in consideration of his sending such a letter, Greenberg sell him syrup at a "cheaper price in the form of a rebate" of two cents for each pound of sugar obtained pursuant to this plan (R. 141, 190–191). Greenberg replied, "You write me that letter and you have got a deal" (R. 141). Petitioner asked Greenberg "what the routine would be if he wrote the letter" (R. 142). Greenberg explained that either he or his brother Leo, vice-president of the corporation (R. 137), would file the letter, together with "invoices showing that I was shipping him syrup for

shipment by him to the Brooklyn Navy Yard," with the O.P.A. form requesting replacement sugar (R. 142, 150). A rough draft of the proposed letter was prepared by petitioner and Greenberg (R. 145–146), and thereafter a final draft, dated March 3, 1943, and without substantial changes, was sent by petitioner to Greenberg (R. 143).[2] False invoices were made out pursuant to the agreement (R. 150–151), and Leo Greenberg filed them with the Rutherford ration board (R. 149; see R. 225–230). The letter itself was never filed with the board, but was retained in the files of the corporation (R. 143; see R. 232, 237, 244–245).

The Greenbergs received approximately 25 million pounds of sugar above their basic quota, ten million of which was sold to petitioner in the form of syrup (R. 190–191). Petitioner was paid approximately $500,000 in cash in the form of "rebates" on all the replacement sugar obtained by the Greenbergs because "the idea * * * originated" with petitioner (R. 152; see R. 190–191).

Petitioner's purchases of syrup from the Greenbergs increased noticeably after the plan was put into effect (R. 295), and the transactions were subsequently handled by the elimination of invoices and the payment of cash, through a trucker,

[2] The terms of this letter are set out in the opinion of the circuit court of appeals (R. 594, fn.).

rather than by check (R. 153–154, 289–292, 296, 300–301).[3]

Petitioner's defense, as revealed by the record, was that the letter of March 3, 1943, did not actually contain any false statement (R. 363, 389–391, 504–505), that it was never presented to the ration board (R. 232, 237, 244–245, 365, 489–490), that he did not give it to the Greenbergs to aid them in any illegal purpose (R. 363, 385, 389–392, 398, 403, 504–506), and that he was never paid any rebates by the Greenbergs for the replacement sugar they obtained (R. 365, 395–397, 496–501).

The case was submitted to the jury on the theory that although petitioner did not directly perpetrate the crimes, he could be held responsible if he was an aider or abettor (R. 542–543).[4]

Several weeks prior to petitioner's trial under the instant indictment, he had been tried under another indictment, filed the same day, October 2, 1945 (see R. 53), charging in substance that petitioner, together with his codefendants in the instant indictment (the Fresh Grown Preserve Corporation, Murray Greenberg, and Leo Greenberg), the S. J. Baron Corporation, the Royal Crown Bottling Companies of Baltimore and

[3] The evidence is also summarized in the opinion of the circuit court of appeals (R. 592–595, fn. 2).

[4] 18 U. S. C. 550 provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Washington, and William C. Franklin, conspired to file false invoices with the same Rutherford ration board in order to enable the Greenbergs and their corporation to obtain improper replacements of sugar for that contained in products sold to the other defendants (Ex. D–3, R. 54).[5] Fifteen overt acts were alleged (*id.*, pp. 5–9), of which one (No. 3) was the sending by petitioner of the letter of March 3, 1943, involved in the instant case (*supra*, pp. 4–5). The Fresh Grown Preserve Corporation, Murray Greenberg, Leo Greenberg, and the S. J. Baron Corporation pleaded guilty to the conspiracy indictment (Ex. D–2, p. 563). The Royal Crown Bottling Companies and Franklin were acquitted by direction of the court (*id.*, pp. 436–438, 563). This left petitioner as the only defendant on trial (*id.*, p. 563).

There was concededly no evidence of any relationship between the Baron Corporation and petitioner (*id.*, pp. 503, 504), but the trial judge nevertheless thought, apparently, that an "overall conspiracy" embracing petitioner, the Greenbergs and the Baron Corporation, could be found

[5] The conspiracy indictment and the stenographic transcript of the proceedings at the conspiracy trial were introduced in evidence as Exhibits D–3 (R. 54) and D–2 (R. 38), respectively, in support of petitioner's pre-trial motion in the instant case to dismiss the indictment on the grounds of former jeopardy and *res judicata* (see R. 37–54). Petitioner did not file these exhibits with his petition for certiorari, but we have lodged them with the Clerk for the information of the Court.

by the jury (see colloquy at *id.*, pp. 503–507) if they concluded that the co-defendants as to whom he had not directed acquittal, had a "common purpose" (see *id.*, pp. 566, 567, 568). However, it is not clear under his instructions as to "common purpose", when considered in connection with his other instructions on conspiracy (*id.*, pp. 562, 564, 565, 567, 578 (the 12th requested instruction)), whether he meant that a verdict of guilty was contingent upon a finding by the jury not only that petitioner had conspired with the Greenbergs but also with the Baron Corporation, or whether it was sufficient merely if they found that he had conspired with the Greenbergs alone. Petitioner was found not guilty, and a judgment of acquittal was entered (R. 37).

Prior to the trial below, petitioner moved to dismiss the indictment on the grounds of former jeopardy and *res judicata* (R. 37). In support of the motion, he introduced in evidence the conspiracy indictment (Ex. D–3, R. 54), the stenographic transcript of the proceedings at the conspiracy trial (Ex. D–2, R. 38), and the judgment of acquittal (Ex. D–1, R. 37). After extensive oral argument (R. 37–54), the motion to dismiss was denied (R. 54). Petitioner renewed his contentions throughout the trial. See, e. g., R. 59, 64, 71–83, 100–101, 136–137, 338–342, 343–345, 359, 476–477.

ARGUMENT

In recognition of the well-settled principle that a conspiracy is a distinct offense from a crime which is an object of the conspiracy (*United States* v. *Bayer*, No. 606, O. T. 1946, decided June 9, 1947; *Pinkerton* v. *United States*, 328 U. S. 640, 644), petitioner has abandoned his contention that the trial below constituted double jeopardy (Pet. 16). He insists, however, as he did below, that his trial as an aider and abettor of the Greenbergs' offenses was, in essence, a re-litigation of the issue of whether he was a conspirator with the Greenbergs and that, this issue having been resolved in his favor at the previous trial, the re-litigation violated the principle of *res judicata* (Pet. 16, 22–23).

We may assume, for present purposes, that the principle of *res judicata* obtains in criminal proceedings in appropriate circumstances even though double jeopardy may not be involved, and that the doctrine is not only applicable to a ruling by a court but to a verdict by a jury. *United States* v. *Adams*, 281 U. S. 202, 205; *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88; *Frank* v. *Mangum*, 237 U. S. 309, 333–334; *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C. C. A. 3); *United States* v. *Meyerson*, 24 F. 2d 855, 856 (S. D. N. Y.); *United States* v. *McConnell*, 10 F. 2d 977,

979 (E. D. Pa.). A clear example of the latter referred to in the opinion below (R. 592), is the *De Angelo* case.[6]

In the instant case, even if it may be assumed that the jury's verdict in the prior case was susceptible of no other interpretation than that they found that petitioner did not conspire with the Greenbergs, a matter not free from doubt under the record in that case (*supra*, pp. 7–8), it is clear that the Government was not seeking in the present case, as in *Pinkerton* v. *United States*, 328 U. S. 640, 645, to impose responsibility upon petitioner for the Greenbergs' offenses upon a conspiratorial basis. If that had been so the verdict of acquittal of conspiracy with the Greenbergs would presumably, by virtue of the doctrine of *res judicata*, have been fatal to the conviction of petitioner for the Greenbergs' crimes. But in the instant case the Government was proceeding against petitioner on a different basis of responsibility, the aider and abettor principle embodied in 18 U. S. C. 550 (footnote 4, *supra*, p. 6). Under that concept, the jury, pursuant to

[6] In that case the situation was that De Angelo had been acquitted of the substantive offense of robbery, upon proof by the Government designed to establish that he was present at and participated in the robbery. At a subsequent trial of De Angelo for conspiracy to commit the robbery, the Government attempted to establish in support of De Angelo's participation in the conspiracy that he was present at the robbery. It was held that the Government was precluded from doing so because of De Angelo's prior acquittal.

the trial judge's instructions, could have found petitioner guilty as a principal equally with the Greenbergs, even though the jury concluded that the Greenbergs engineered the crimes and all that petitioner did was to assist them by some act, provided, of course, he acted knowingly and intentionally (*Bozza* v. *United States*, 330 U. S. 160, 164–165). The letter of March 3, 1943 (*supra*, pp. 4–5), was itself clearly a sufficient act of aid and assistance, for it assured the Greenbergs of petitioner's cooperation, and served as a "cover-up" in case their fraudulent sugar replacement applications should be questioned by the O. P. A. Also, without reference to the letter, there was adequate basis for the jury to find on the evidence, pursuant to the trial judge's instructions, that petitioner counseled, commanded, induced or procured the commission of the crimes by the Greenbergs.

In none of these aspects of aiding and abetting did the guilt of petitioner depend in any respect upon the existence of a conspiracy between him and the Greenbergs, and the charge to the jury was appropriately devoid of any instructions on conspiracy law. Guilt under the aiding and abetting statute depends not upon agreement as such among the culprits, but solely upon assistance in or propulsion to crime. True, what is done may spell out that degree of association and common interest in the criminal venture which make the defendants partners in crime and hence conspira-

tors (cf. *Direct Sales Company* v. *United States*, 319 U. S. 703, and *United States* v. *Falcone*, 311 U. S. 205), with responsibility for substantive offenses committed by fellow conspirators (*Pinkerton* v. *United States, supra*), but that which determines guilt under the aiding and abetting statute is not agreement *qua* agreement, but solely whether X has knowingly assisted Y's crime or has persuaded Y to commit it, or has procured Y to commit his (X's) crime. The two concepts equally result in responsibility for substantive crime (cf. *Pinkerton* v. *United States, supra*), but each depends upon different factors.

Viewed in this light, the evidence of the arrangements between Murray Greenberg and petitioner prior to the letter of March 3, upon which petitioner bases his argument and which, as the trial judge stated in his instructions, was "the crux" of the situation (R. 550), takes on its true significance. In the prior trial the jury, in order to convict, had to find from the evidence that petitioner was associated with the Greenbergs in such a degree as to make them partners in crime and thus conspirators. In the present trial what the jury was required to determine from the evidence was whether there was activity on petitioner's part which made him a knowing assistant in or counselor of the Greenbergs' crimes or a procurer of those crimes, and not, as he insisted, merely a dupe of the Greenbergs—activity which need not spell out a conspiracy.

We therefore submit that there was in this case no basis for the application of the doctrine of *res judicata* and, hence, no necessity for the allowance of evidence addressed to that question.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	21
Argument:	
The principle of collateral estoppel is inapplicable to this case since the acquittal at the first trial did not necessarily represent a finding that petitioner had not entered into a corrupt agreement with the Greenbergs alone	23
A. The principle of collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely and unequivocally	23
B. The record of the first trial fails to establish that the jury necessarily found that petitioner had not entered into a corrupt agreement with the Greenbergs alone	32
Conclusion	44

CITATIONS

Cases:	
Collins v. *Loisel*, 262 U. S. 426	25
Commonwealth v. *Ellis*, 160 Mass. 165	28
Cromwell v. *County of Sac*, 94 U. S. 351	21, 24
De Sollar v. *Hanscome*, 158 U. S. 216	22, 30, 31
Flanigan v. *Ditto, Inc.*, 91 F. 2d 1	31
Frank v. *Mangum*, 237 U. S. 309	25
Kelliher v. *Stone & Webster*, 75 F. 2d 331	31
Kotteakos v. *United States*, 328 U. S. 750	36
Local 167 v. *United States*, 291 U. S. 293	28
Louie v. *United States*, 218 Fed. 36	25
Morris v. *United States*, 156 F. 2d 525	40
Mercoid Corporation v. *Mid-Continent Co.*, 320 U. S. 661	24
National Lead Co. v. *Nulsen*, 131 F. 2d 51, certiorari denied, 318 U. S. 758	44
Packet Company v. *Sickles*, 5 Wall. 580	29
Pinkerton v. *United States*, 328 U. S. 640	25, 28
Russell v. *Place*, 94 U. S. 606	28
Southern Pacific Railroad v. *United States*, 168 U. S. 1	24, 27
United States v. *Adams*, 281 U. S. 202	21, 23, 27, 41, 42
United States v. *Bayer*, 331 U. S. 532	25
United States v. *Carlisi*, 32 F. Supp. 479	27, 28

Cases—Continued	Page
United States v. *Clavin*, 272 Fed. 985	27
United States v. *De Angelo*, 138 F. 2d 466	27, 28
United States v. *Dockery*, 49 F. Supp. 907	27
United States v. *Halbrook*, 36 F. Supp. 345	27, 32
United States v. *McConnell*, 10 F. 2d 977	27
United States v. *Meyerson*, 24 F. 2d 855	27
United States v. *Morse*, 24 F. 2d 1001	27
United States v. *Oppenheimer*, 242 U. S. 85	25, 27
Vicksburg v. *Henson*, 231 U. S. 259	29
Vogel v. *New York Life Insurance Co.*, 55 F. 2d 205, certiorari denied, 287 U. S. 604	31, 44
Washington, Alexandria and Georgetown Steam-Packet Co. v. *Sickles*, 24 How. 333	22, 99
Woodman v. *United States*, 30 F. 2d 482, certiorari denied, 279 U. S. 855	27
Statutes:	
Criminal Code:	
Section 28 (18 U. S. C. 72)	2
Section 332 (18 U. S. C. 550)	3
Miscellaneous:	
147 A. L. R. 991-993, 994-995	27
Freeman on *Judgments*, 5th ed., vol. 2:	
Page 1364	27
Page 1365	27, 32
Page 1455	32
Page 1460	32

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 174

ROBERT SEALFON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 589–595) is reported at 161 F. 2d 481.

JURISDICTION

The judgment of the circuit court of appeals was entered May 8, 1947 (R. 596). On June 5, 1947, by order of Mr. Justice Burton, the time for filing a petition for a writ of certiorari was extended to July 7, 1947 (R. 598). The petition was filed July 3, 1947, and was granted on October 13, 1947 (R. 598). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, under the principle of collateral estoppel, petitioner's acquittal on a charge of conspiring with several persons to defraud the United States by uttering false invoices to a rationing board precluded his subsequent conviction of aiding and abetting the uttering of certain invoices by some of the persons named as co-conspirators in the prior indictment.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U. S. C. 72) provides:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the

> United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On October 2, 1945, two indictments were returned against petitioner and others in the United States District Court for the District of New Jersey (R. 5, 8–33; Ex. D–3, R. 54). The one on which the instant prosecution is based charged that petitioner, Fresh Grown Preserve Corporation, and its officers, Leo and Murray Greenberg, for the purpose of defrauding the United States and to induce the rationing board of Rutherford, New Jersey, to issue sugar replacement certifi-

cates, did knowingly utter and publish as true false invoices purporting to show sales of vanilla syrup by Fresh Grown to petitioner for delivery to the Brooklyn Navy Yard, an exempt agency for sugar products, whereas the syrup had in fact been delivered by Fresh Grown to petitioner for purposes other than delivery to an exempt agency. The indictment contained 12 counts, each relating to a particular invoice presented to the rationing board on a specified date between October 19, 1943, and April 6, 1944 (R. 8–33).

The other indictment charged a continuing conspiracy among the defendants named in the indictment described above and three other corporations, S. J. Baron Corporation, Royal Crown Bottling Co. of Baltimore, Inc., and Royal Crown Bottling Co. of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. It charged that, during the period from January 1, 1943, to April 15, 1944, the defendants conspired to commit offenses against the United States by presenting false invoices to the Rutherford rationing board purporting to show sales of sugar products for delivery to exempt agencies, by making false representations in this respect to the rationing board in a matter within its jurisdiction, and by such means defrauding the United States of its governmental function of conserving and rationing sugar. The indictment alleged that it was part of the conspiracy that Fresh Grown would deliver to the

other conspirators large amounts of sugar and sugar products for their own purposes and not for sales to exempt agencies, that in order to deceive the United States, the defendants would keep false records in regard to their shipments and receipt of sugar and sugar products, and that petitioner, Baltimore Royal Crown, and Baron would deliver to Fresh Grown letters indicating that they had made sales principally to exempt agencies, whereas in fact they had made few, if any, sales to exempt agencies. As overt acts the indictment alleged the delivery by each of the three named conspirators of the letters referred to above, the presentation by Fresh Grown to the rationing board of a number of false invoices, purportedly showing deliveries to companies not named in the indictment as defendants, and the filing with the board of a number of fraudulent applications for the replacement of sugar (Ex. D–3, R. 54).

The conspiracy indictment was tried first.[1] Of the defendants named therein, Fresh Grown and its officers pleaded guilty, and the S. J. Baron Corporation pleaded nolo contendere (R. 571), so that the trial proceeded against petitioner, the Royal Crown companies and their president (Tr.

[1] The stenographic transcript of the first trial was introduced in evidence at the trial of the second case, in connection with petitioner's motion to quash and plea in bar, as Ex. D–2 (R. 38). This exhibit, together with the conspiracy indictment (Ex. D–3), has been lodged with the Clerk of this Court. References to the exhibit are designated as "Tr."

563). At the close of the Government's case, the court granted a motion for a directed verdict of acquittal as to the Royal Crown companies and their president (Tr. 377–424, 436–438) and later in his charge instructed the jury to return such a verdict (Tr. 563), with the result that the jury was called upon to reach a determination as to whether petitioner was implicated in a conspiracy involving the Greenbergs, Fresh Grown and the Baron corporations. (Tr. 562, 563.)

The evidence adduced at that trial may be summarized as follows:

Under regulations governing the rationing of sugar, industrial users were allotted a quota based on a percentage of the amount used for civilian and non-export purposes in 1941. In computing this allotment, there was excluded from consideration the amount contained in products delivered for export or for use of certain exempt agencies, such as the armed services. For such sugar, replacement certificates, in addition to the civilian quota, could be issued by local rationing boards on evidence deemed by them sufficient to show delivery of the sugar products to exempt agencies (Tr. 63–65, 66–69, 74–77).[2]

[2] The procedure was changed after July 1, 1943, to require applications for replacement of sugar in products sold after that date to be made to the exempt agencies themselves (Tr. 65–66, 70–71, 73–74), but the Rutherford Rationing Board was unaware of the change and continued to act in accordance with the prior procedure until around April 1944 (Tr. 100, 102–103, 109, 112–113, 118).

In February, March, and April 1943, Fresh Grown, through Leo Greenberg (see Tr. 81–82), applied to the Rutherford Rationing Board, and was given replacements, for sugar in products allegedly sold for export or for delivery to an exempt agency, to four different corporations not named as defendants in the indictment. He presented to the rationing board invoices purporting to show deliveries to the companies for such purposes, but no sugar products had in fact been sold by Fresh Grown to those companies, except some few deliveries to Colonial Stores, Inc., which did not correspond to the invoices submitted to the rationing board, and which were not made for shipment to exempt agencies. (Tr. 121, 144, 158–159, 162–164, 166–167.)[3]

In February 1943, one Sanford Doctors, who was employed by a sugar broker, arranged to sell some of Fresh Grown's vanilla syrup to petitioner, who conducted his business under the name of Sero Syrup Co. (Tr. 191–192). Late in February, Murray Greenberg told Doctors that if petitioner would give him a letter stating the places where he delivered syrup, and if there were exempt agencies in that group, it would be possible to deliver more syrup to petitioner (Tr. 193–194, 217–218,

[3] When this testimony was introduced, petitioner's counsel objected to it on the ground that it was not binding on his client, and the court allowed it in evidence subject to having the motion renewed if the Government failed to establish a conspiracy involving petitioner (Tr. 122, 144–145, 160, 165; see also Tr. 123).

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219). Doctors conveyed the message to petitioner (Tr. 194–195). Petitioner delivered to Greenberg a letter, dated March 3, 1943, reading as follows (Ex. G–7, Tr. 223, 339):

> In regard to your request for information about our sales outlets we wish to advise you that at the present time some of our syrups are being sold at the Brooklyn Navy Yard, Republic Aircraft, General Aircraft, Sheepshead Bay Training Station, and various other defense plants throughout Long Island. The total amount used by these plants varies from approximately 1,200 gallons to 2,000 gallons per week.

Petitioner had made no sales of syrup to the Brooklyn Navy Yard (Tr. 240–241). He had sold to a canteen, which operated vending machines for civilian employees at the Brooklyn Navy Yard, a few gallons of syrup, but none of it was vanilla syrup (Tr. 460–462, 465–469, 481–482, 485–486).

The letter was not shown to the Rutherford Rationing Board (Tr. 97–98, 111–112, 117), but Fresh Grown presented to the rationing board a number of invoices purporting to show sales of vanilla syrup to petitioner for delivery to the Brooklyn Navy Yard. On the basis of these applications, Fresh Grown received replacement certificates for 21,727,855 pounds of sugar and delivered syrup containing almost 10 million pounds of sugar to petitioner (Tr. 131–132, 235). Petitioner at first paid for the syrup by check (Tr. 264–272), but from June 1943 made pay-

ments to Fresh Grown in cash, giving a check to his trucker, who cashed the check, deducted the trucking fee, and then delivered cash to Greenberg (Tr. 251–252, 256, 278). Ninety-eight percent of the syrup purchased by petitioner from Fresh Grown was delivered to the National Biscuit Co., and the balance to other nonexempt agencies (Tr. 254–255, 259, 482). Petitioner paid to Doctors approximately $12,000 as an alleged finder's fee (Tr. 198–200, 212–214).

In March 1943, Leo Greenberg asked Martin Lowenthal, who acted as broker in Fresh Grown's transactions with the S. J. Baron Corporation, to obtain from Baron a letter setting forth where he disposed of the syrup sold to him by Fresh Grown, stating that if the syrup went to exempt agencies Fresh Grown would be in a position to get additional sugar. Lowenthal transmitted the message to Baron (Tr. 167–171). The first letter sent by Baron did not enumerate specific places to which the syrup was delivered, and was rejected (Tr. 171–172). Baron then sent another letter stating that his company made sales to various army and navy stations which he enumerated (Tr. 172–173; Ex. G–8, Tr. 176, 336). On the basis of invoices purporting to show sales to the Baron Corporation, for shipment to such exempt agencies, Fresh Grown received replacement certificates for 610,278 pounds of sugar (Tr. 137–138). 342,330 pounds in the form of vanilla syrup were sold by Fresh Grown to Baron, but none of the syrup

was delivered to the exempt agencies listed (Tr. 183–185).[4]

In all, Fresh Grown received replacement certificates for 25,578,144 pounds of sugar on the basis of invoices purporting to show sales for delivery to exempt agencies or for export (Tr. 132–133).

At the close of the case, petitioner moved to strike all testimony and exhibits not relating to his client, including those relating to the Baron transactions (Tr. 502–506). In overruling the motion outside the presence of the jury, the judge stated that he thought it was a question of fact for the jury to determine whether there was an over-all conspiracy participated in by petitioner, the Greenbergs, and Baron (Tr. 506–507; see also Tr. 508, 512).

In his summation for the defense, counsel, among other things, stressed the fact that the Greenbergs had made false applications to the rationing board before petitioner's letter of March 3 was written (Tr. 522–523). He pointed out that the indictment charged that the conspirators kept false books, but that there was no

[4] Petitioner objected to the admission of evidence concerning Baron's transactions with Greenberg on the ground, *inter alia*, that it related to a separate conspiracy between Baron and the Greenbergs. The judge instructed the jury that the evidence was not to be considered against defendants other than those to whom the testimony related until such time as there appeared to be sufficient evidence of a conspiracy among them and the other defendants (Tr. 168–170, 175, 181–182).

evidence that petitioner had kept false books (Tr. 523). He stressed the fact that Fresh Grown had received more than 21 million pounds of sugar on the basis of false applications involving alleged deliveries to petitioner, whereas petitioner obtained only nine million pounds from Fresh Grown, and argued (Tr. 527–528):

> If the Greenbergs were co-conspirators of ours, we had an outlet to the National Biscuit; they got 21,000,000. I think it is now proven and conceded that we got about 9,000,000. Why shouldn't we have taken all the 21,000,000 if we knew about that, if we knew that they got 21,000,000 why shouldn't we have taken all of it? We could have sold it, you can say to yourselves from the evidence, to the National Biscuit Company.

He also said (Tr. 538–539):

> * * * Baron had nothing to do with us, nor has anyone else anything to do with us in this case. Our dealings are directly with the Greenbergs, as the proof shows; no connection between Baron or any other person. They didn't know us and we didn't know them. I think that's the proof in the case. We decline to be responsible for any of their activities with the Greenbergs or the activities of any other persons and the Greenbergs. * * *.

The United States Attorney, in his summation, admitted that the Greenbergs initiated the practice of filing false applications before the letter of March 3d, but pointed out that, initially, they

were allegedly for export purposes (Tr. 546–547). He referred to the Baron letter, and said (Tr. 552):

> * * * We ask you to consider the evidence introduced about the Baron participation in order to show you that there was a conspiracy and what the plan was and how it operated; and if you look at the letter of March the 29th you will see that it is not very much different than the one of March the 3d which Sealfon wrote. * * *

He referred to the fact that the Greenbergs acted through a broker in making suggestions to Baron just as they had with respect to petitioner, and said (Tr. 553–554):

> * * * And there again is the pattern and the plan of this conspiracy, and it makes no difference whatever, ladies and gentlemen, whether the Baron Corporation ever knew Sealfon or whether Sealfon ever had any transactions of any kind with that company. * * *
>
> If you consider the similarity between those two transactions you will see that the plan was there and carried out in the same identical manner. * * *

In submitting the case to the jury the judge charged (Tr. 565–566, 568, 569):

> The elements of a conspiracy are, first, an object to be accomplished, which must be either the commission of an offense

against the United States or the commission of an offense to defraud the United States; secondly, a plan or scheme embodying the means to accomplish the object; thirdly, an agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means agreed upon; and, fourth, as I have said, an overt act by one or more of the conspirators, to effect the object of the conspiracy.

* * * You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if you should find that there was no conspiracy, that would end the matter completely. In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will apply. I shall refer to those rules and when I refer to them you must keep in mind that they apply only if you find a conspiracy existed and that this defendant was a member of such conspiracy and that he conspired with others named in the indictment to attain the ends set forth in the indictment.

It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite. Of course, entry into the conspiracy may be made after its initiation, provided the person who entered it after it was formed had knowledge of its aim and had an intent to participate in the common agreement and to forward its design. Mere knowledge of the existence of a conspiracy, or even acquiescence in or approval of its ends and aims, without cooperation or agreement to cooperate, is not sufficient to make one a conspirator to commit the act. * * *

* * * * *

All members of the conspiracy need not know all of the acts done by any other member in order to effectuate the end of the conspiracy. It is enough that they have the common purpose, that they entered into the common agreement to effectuate the illegal purpose, and that they were members of the conspiracy; because they are held to be responsible for the acts of co-conspirators done in furtherance of the conspiracy, provided you find the conspiracy exists and that this defendant and the persons whose acts are in question are members of this conspiracy.

* * * * *

I shall repeat to you that the common

> design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned in so far as the objects of the conspiracy are concerned.

The judge did not refer to specific testimony nor by name to particular alleged conspirators, except that, in ruling on petitioner's various requested charges, he did give request No. 12, reading as follows (Tr. 578):

> If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

He said, "That I have already charged, but I will repeat it." The jury acquitted petitioner (R. 37).

Thereafter, the Government proceeded with the trial on the indictment for the substantive offenses previously returned against Fresh Grown, the Greenbergs, and petitioner (see, *supra,* pp. 3–4). Fresh Grown and the Greenbergs pleaded guilty with the result that petitioner alone was tried (R. 5).

Petitioner moved to quash the indictment on

the grounds that the second trial would place him in double jeopardy and that, on the principle of *res judicata*, the previous judgment was conclusive as to all issues raised in the instant indictment (R. 37). He introduced in evidence the previous indictment, the stenographic transcript of the trial, and a certificate of petitioner's acquittal (Exs. D-1—D-3; R. 37-38, 54). The judge overruled petitioner's motion and also a plea in bar on the same grounds, and the case went to trial (R. 52-54).*

At the second trial, which proceeded on the basis that petitioner was an aider and abettor of the Greenbergs (R. 59-60), the Government again had an expert witness testify to the regulations governing industrial users of sugar and the right to obtain replacement certificates for sugar in products sold to exempt agencies (R. 83-91). It introduced in evidence the false invoices mentioned in the indictment purporting to show sales of vanilla syrup by Fresh Grown to petitioner for delivery to the Brooklyn Navy Yard (R. 225-230, 239-243, 248-253, 257-258).

* The *res judicata* principle was invoked on objection to the prosecutor's opening statement (R. 64; see R. 59); the motion on such ground was renewed and overruled after the Government's opening statement following extended discussion (R. 70-81); and objections to testimony on the ground that the issues had been litigated at the previous trial were made throughout the second trial (R. 100-101, 136-137, 146-147, 240-241, 273, 315, 316, 338-342). The motion was again renewed at the close of the Government's case (R. 344-345, 359), and at the close of the whole case (R. 476-477).

Doctors testified, as at the previous trial, concerning his arrangement of the initial sale of Fresh Grown syrup to petitioner, his conversation with petitioner to the effect that Murray Greenberg wanted a letter stating to which exempt agencies petitioner made delivery, and to the fact that petitioner paid him an alleged finder's fee (R. 102–109). The Government introduced the letter of March 3d (Ex. G–4, R. 145) and showed that petitioner had made no sales to the Brooklyn Navy Yard (R. 337–338). It showed that the Greenbergs received more than 21 million pounds of sugar for replacement of sugar in syrup allegedly sold to petitioner for delivery to the Brooklyn Navy Yard (R. 270–271), and that almost 10 million pounds were sold as syrup by Fresh Grown to petitioner (R. 283–284, 315); that 98 percent of the syrup sold to petitioner was delivered to the National Biscuit Co. (R. 285–287). It showed that, starting in June 1943, payments for the sugar were made in cash by checks given to the trucker (R. 290–293).

In addition, the Government proved that petitioner's basic quota for each of the years 1942, 1943 and 1944 was no more than approximately 200,000 pounds (R. 100). On cross-examination of petitioner, who at this trial took the stand in his own behalf, the Government brought out the fact that petitioner had unsuccessfully attempted to obtain from his own rationing board in Brooklyn, New York, sugar replacement certif-

icates for sales to the defense industries listed in the letter of March 3d, and that he had claimed that he made sales at the Brooklyn Navy Yard (R. 413–424).

It also introduced the testimony of Murray Greenberg, who had not testified at the first trial except to identify, on behalf of the Fresh Grown Corporation, a certain exhibit (Tr. 332–334). Greenberg testified that he first met petitioner at the time of the initial sale of syrup to him through Doctors in January 1943 (R. 138). He said that petitioner kept asking him for more syrup and that he replied that he could not make further deliveries under his quota (R. 139–140). After Greenberg had had a conversation with Doctors, petitioner visited him at his plant (R. 140). Greenberg reported the conversation as follows (R. 140–141):

> Then Mr. Sealfon visited me at Lyndhurst and said that he was selling a civilian company at the Brooklyn Navy Yard and that if he would write me a letter saying that he was selling to or at the Brooklyn Navy Yard without mentioning the civilian company, to leave the inference that he he was selling the Brooklyn Navy Yard, what kind of a deal could he work out; and I said to Mr. Sealfon, "What kind of a deal would you like or would you want?" and Mr. Sealfon said he would like if he did that, he would like a cheaper price in the form of a rebate. And I said to Mr.

> Sealfon, "How much of a rebate would you want?" and he said, "Two cents a pound." And I said, "You write me that letter and you have got a deal."

Greenberg testified that he told petitioner that he would take the letter to the local rationing board and would attach invoices showing that sales of syrup were made to petitioner for delivery to the Brooklyn Navy Yard (R. 141–142, 150). Greenberg and petitioner drew up a draft of the letter of March 3 (R. 146), and subsequently Greenberg received the letter in final form, together with a contract calling for the delivery of 1,200 gallons of syrup per week (R. 143; Ex. G–4, R. 145; see R. 520). Greenberg testified that he gave petitioner a rebate of two cents a pound on all replacements of sugar he obtained, even on sugar not used in products delivered to petitioner (R. 152, 190–191). The rebates were paid in cash and amounted to one-half a million dollars (R. 152). The arrangements for the payment of cash by petitioner to Fresh Grown were made in order that Greenberg might have the cash from which to pay the rebates to petitioner (R. 153–154).

In submitting the case to the jury, the judge read the aider and abettor statute (18 U. S. C. 550), providing that—

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its com-

mission, is a principal.

* * * * * *

and said—

> An aider and abettor is a person who, although not the direct perpetrator of a crime, yet does some act to render aid to the actual perpetrator thereof, or to abet the perpetration of the offense. * * * (R. 543.)

After reviewing the evidence that petitioner had made attempts to get sugar replacements, that he had made a few purchases from Greenberg, and that subsequently he received large quantities of syrup from Greenberg (R. 550), the court said (R. 551):

> * * * that discussion which was had between Greenberg and Sealfon is the crux of this situation. * * *
>
> The Government has introduced in evidence a letter and has brought before you the testimony of Greenberg which preceded the writing of the letter. It is for you to determine what is the truth of that whole situation. The fact is admitted that before the discussion and before the letter Sealfon received certain amounts of syrup from Greenberg, and that thereafter he received enormously increased amounts. These are elements which have been testified to and which you may use as a basis for drawing your inferences. There is a direct conflict in the testimony of Greenberg and Sealfon as to what happened about that letter. Sealfon gave an explanation which

it is for you to determine whether it is reasonable or not, and which will also be of importance in your determination.

The jury convicted petitioner on this indictment (R. 565–566). Petitioner was sentenced to imprisonment for five years and fined $1,000 on each count, the prison sentences to run concurrently (R. 574). On appeal the judgment of conviction was affirmed (R. 596).

SUMMARY OF ARGUMENT

Admittedly, petitioner's trial as an aider and abettor was for a different offense from his earlier trial for conspiracy. Hence the aspect of *res judicata* involved in the instant case is the application of the principle usually designated as estoppel by judgment or collateral estoppel, that the judgment in a prior action is conclusive only as to those matters actually in issue upon which the finding or verdict of the jury necessarily rested. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353.

We start with the assumption that, as stated by this Court in *United States* v. *Adams*, 281 U. S. 202, 205, the principle of collateral estoppel does apply to successive criminal trials for different offenses. It is, nevertheless, firmly established that that doctrine is inapplicable unless the issue determined by the prior judgment can be ascertained clearly, definitely, and unequivocally. Where the record of the first trial reveals that the verdict of the jury may have been based on alternate grounds, neither ground can be taken as conclusively established by the prior verdict.

Washington, Alexandria and Georgetown Steam-Packet Company v. *Sickles*, 24 How. 333; *De Sollar* v. *Hanscome*, 158 U. S. 216.

In the instant case, the record of the first trial reveals that the verdict of acquittal does not, as petitioner contends, necessarily constitute a finding that petitioner had not entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d. The entire trial for conspiracy was predicated on the theory that petitioner was a party to a general over-all conspiracy involving, ultimately, petitioner, the Greenbergs, and the Baron Corporation, and the jury was never definitely or even impliedly told that petitioner could be convicted if he was not part of the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater possibility, that the jury was impelled to return a verdict of acquittal on a finding that petitioner was not a party to the over-all fraud as on a finding that petitioner did not write the March 3d letter pursuant to a corrupt agreement with the Greenbergs. Hence the verdict of acquittal at the first trial can be taken as establishing only that the whole offense submitted to the jury was not proved, i. e., that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and

the Baron Corporation. It is not a finding as to any particular ground which may or may not have influenced the jury to reach that ultimate conclusion. *United States* v. *Adams*, 281 U. S. 202, 205. Hence, the verdict is not a finding that petitioner had not entered into a corrupt agreement with the Greenbergs.

Since, at the second trial, the Government was not required, in order to establish petitioner's guilt as an aider and abettor of the substantive offenses charged, to show that petitioner participated in a conspiracy involving persons other than the Greenbergs, the acquittal on the conspiracy charge did not preclude the Government from offering proof tending to show that petitioner wrote the letter of March 3d pursuant to an agreement with the Greenbergs for the specific purpose of enabling the Greenbergs to obtain and sell to petitioner large quantities of sugar in the form of syrup to which he was not entitled.

ARGUMENT

THE PRINCIPLE OF COLLATERAL ESTOPPEL IS INAPPLICABLE TO THIS CASE SINCE THE ACQUITTAL AT THE FIRST TRIAL DID NOT NECESSARILY REPRESENT A FINDING THAT PETITIONER HAD NOT ENTERED INTO A CORRUPT AGREEMENT WITH THE GREENBERGS ALONE

A. THE PRINCIPLE OF COLLATERAL ESTOPPEL APPLIES ONLY WHERE THE BASIS OF THE PRIOR JUDGMENT CAN BE ASCERTAINED CLEARLY, DEFINITELY AND UNEQUIVOCALLY

The principle of *res judicata*, as applied in civil cases, has two aspects. One is the doctrine of *res judicata* in the strict sense of the term, i. e.,

that a judgment in one action is a bar to another action on the same claim or demand, not only as to every matter which was in fact litigated, but as to every matter which might have been litigated in the prior action. The other, usually designated as estoppel by judgment, or collateral estoppel, applies even where the second action between the same parties is upon a different claim or demand, but then the judgment in the prior action is conclusive only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48–52; *Mercoid Corporation* v. *Mid-Continent Co.*, 320 U. S. 661, 671.

The first aspect is not here involved. For the most part, that principle, as applied to criminal cases, is governed by the constitutional prohibition against double jeopardy which bars a second prosecution for the same offense. And, even where the defense of double jeopardy may not be available, as for example, where the first prosecution has been determined on a plea in bar before the defendant has been placed in jeopardy, this Court, invoking the doctrine of *res judicata*, has held that a judgment on the merits in the first prosecution is a conclusive bar to the second, despite the absence of a constitutional prohibition

against the second trial. *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88.*

Here, however, the second prosecution is not for the same offense as the first. Petitioner has in this Court abandoned the contention made in the district court that his trial as an aider and abettor in the commission of the substantive offenses charged in the second indictment after his acquittal of conspiracy placed him in double jeopardy. The decisions of this Court definitely establish that conspiracy is a distinct offense from the substantive crimes which may be the object of the conspiracy, and that separate trials for conspiracy and for the substantive crimes do not violate the constitutional limitation against double jeopardy. *United States* v. *Bayer*, 331 U. S. 532, 541–543; *Pinkerton* v. *United States*, 328 U. S. 640, 644; and see dissenting opinion of Mr. Justice Rutledge in the *Pinkerton* case at p. 649. See also *Louie* v. *United States*, 218 Fed. 36, 39–40 (C. C. A. 9).

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* In the *Oppenheimer* decision, in rejecting the Governments contention that *res judicata* does not exist for criminal cases except to the extent that it is covered by the double-jeopardy provision of the Fifth Amendment, the Court, speaking through Mr. Justice Holmes, said that "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt" (p. 87). Authorities were cited for the view that the criminal law and the civil law are in unison in this respect (p. 88).

For other expressions by the Court that *res judicata* is applicable in criminal cases, see *Frank* v. *Mangum*, 237 U. S. 309, 334; *Collins* v. *Loisel*, 262 U. S. 426, 430.

The question here is whether the principle of collateral estoppel, as distinct from double jeopardy or *res judicata* in the strict sense, serves to preclude, not petitioner's trial, but petitioner's conviction of the substantive offenses on the basis of the evidence adduced against him on the second trial. Petitioner's contention, in essence, is that the evidence introduced against him on the trial for the substantive offenses was designed to prove that he was an aider and abettor because he had entered into a corrupt agreement with the Greenbergs, pursuant to which he knowingly aided the commission of the substantive offenses, and that, since the first trial had determined that he had not entered into a corrupt agreement with the Greenbergs, the jury should not have been allowed at the second trial to find an agreement and determine guilt on the substantive offenses on the basis thereof. He does not deny that he could properly have been convicted as an aider and abettor if the Government's proof had established knowing assistance without agreement. And he does not deny that if the testimony offered at the second trial could properly have been considered by the jury, there was sufficient evidence adduced to support his conviction for knowingly and actively assisting in the commission of the substantive offenses charged in the second indictment.

We can start with the assumption that the principle of collateral estoppel in civil cases—that a fact definitely found in one action is conclu-

sively established between the same parties even where the second action is based on a different claim—applies to successive criminal prosecutions for different offenses. On the basis of *United States* v. *Oppenheimer, supra,* this Court, without discussion, so stated in *United States* v. *Adams,* 281 U. S. 202, 205.[7] Lower federal court decisions[8] and most state authorities[9] are to the same effect, although they differ in their methods of applying the principle to specific facts. The principle may be accepted for the purposes of this case.[10] But it is a firmly established tenet that

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[7] In this case, in overruling a plea of former acquittal because the offenses were different, the Court stated that the judgment was nevertheless "conclusive upon all that it decided." The case is further discussed at pp. 41–43, *infra.*

[8] *United States* v. *De Angelo,* 138 F. 2d 466, 468 (C. C. A. 3); *Woodman* v. *United States,* 30 F. 2d 482, 484 (C. C. A. 5), certiorari denied, 279 U. S. 855; *United States* v. *Meyerson,* 24 F. 2d 855, 856–857 (S. D. N. Y.); *United States* v. *Morse,* 24 F. 2d 1001 (S. D. N. Y.); *United States* v. *McConnell,* 10 F. 2d 977, 979 (E. D. Pa.); *United States* v. *Dockery,* 49 F. Supp. 907, 908 (E. D. N. Y.); *United States* v. *Halbrook,* 36 F. Supp. 345, 348 (E. D. Mo.); *United States* v. *Carlisi,* 32 F. Supp. 479 (E. D. N. Y.); *United States* v. *Clavin,* 272 Fed. 985, 987 (E. D. N. Y.)

[9] The state authorities are collected in 147 A. L. R. 991–993, 994–995; see also Freeman, *Judgments,* 5th ed., vol. 2, pp. 1364–1365.

[10] It is worth noting, however, that an anomaly results from the application of the doctrine to criminal cases. In the *Adams* and *Oppenheimer* cases, the judgments in the prior cases had been in favor of the accused. If the principle of repose, on which the doctrine rests (see *Southern Pacific Railroad* v. *United States,* 168 U. S. 1, 50) is valid, it should apply equally to convictions as well as acquittals.

collateral estoppel cannot be applied unless that which was determined by the prior judgment can be ascertained clearly, definitely, and unequivocally. In *Russell* v. *Place*, 94 U. S. 606, 610, this Court said:

> According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel

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It is in fact more easily applied to convictions, where a jury must find that every element of the offense charged has been proved, than to acquittals, where a jury must acquit if any one element is not established. Yet, although this Court has allowed a criminal conviction to be taken as conclusively establishing the facts necessary to sustain an injunction (*Local 167* v. *United States*, 291 U. S. 293, 298), and some state courts have given conclusive effect to a prior conviction as establishing facts to be determined in a second criminal prosecution (see *Commonwealth* v. *Ellis*, 160 Mass. 165), general application of the doctrine would, it seems to us, present difficulty. For example, if the doctrine of collateral estoppel were logically applied, proof alone of conviction for conspiracy would, applying the doctrine of *Pinkerton* v. *United States*, 328 U. S. 640, be enough to establish liability for substantive crimes contemplated by the conspiracy and actually committed pursuant thereto. Yet, since a court cannot in criminal cases take away from the jury its prerogative of acquitting in the teeth of the evidence, no verdict of conviction could be directed, and it seems unlikely that a conviction for the substantive offenses would be allowed to rest merely on proof of conviction for conspiracy. See *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C. C. A. 3); *United States* v. *Carlisi*, 32 F. Supp. 479, 482 (E. D. N. Y.). In actual practice, federal trials for different offenses arising out of the same transaction have proceeded on proof *de novo* even though a conviction has been obtained.

in it when pleaded, and nothing conclusive in it when offered as evidence.

"To hold upon any unsubstantial ground that a controversy has beer thus concluded is to do an injustice to litigants." *Vicksburg* v. *Heuson,* 231 U. S. 259, 268.

Because of this limitation, this Court has held that, where the record of the first trial reveals that the verdict of the jury may have been based on alternate grounds, neither ground may be taken as conclusively established by the prior verdict for the purpose of applying the principle of collateral estoppel. Thus in *Washington, Alexandria and Georgetown Steam-Packet Company* v. *Sickles,* 24 How. 333, plaintiffs brought an action on a contract and contended that a verdict in their favor in a prior action had definitely established the existence of the contract. This Court pointed out, however, that in the prior action, there were only two counts upon the contract and other general counts in assumpsit, that the verdict was a general one on the entire declaration and might have been rendered on the common counts. It accordingly held that, in the absence of proof that the existence of the contract had necessarily formed the basis of the jury's verdict in the prior action, the prior judgment could not be relied upon as establishing the existence of the contract. See also *Packet Company* v. *Sickles,* 5 Wall. 580.

In *De Sollar* v. *Hanscome*, 158 U. S. 216, Hanscome's agent had executed a contract for the sale of real property to De Sollar. Hanscome, claiming to have repudiated the contract, had brought an action against De Sollar for damages in placing the contract on record. That action was defended on two grounds: (1) That Hanscome had ratified the act of his agent and (2) that De Sollar had acted in good faith in placing the contract on record. The jury had returned a verdict for De Sollar. In an action by De Sollar for specific performance of the contract in which Hanscome again claimed to have repudiated the contract, De Sollar argued that the judgment in the prior action had conclusively established Hanscome's ratification of the contract. This Court pointed out that, although the judge in the first trial had told the jury that the chief question was whether Hanscome had ratified the contract, he had also charged that there was no question of punitive damages because De Sollar had acted in good faith and that there was no direct showing of actual damage. Finding that under these instructions the jury were at liberty to return a verdict for De Sollar if they thought Hanscome had suffered no damage, and that the judge's statement that the question of ratification was the main issue did not preclude the possibility that the verdict was based on another ground, this Court held that the verdict in the prior action

could not form the basis of an estoppel on the issue of ratification. It said (pp. 221–222):

> Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment.
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> * * * * *
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> There is in this case no extrinsic testimony tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and the charge of the court from which to determine that fact, and in the light of the charge it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails.[11]

[11] For further applications of this principle, see *Flanigan* v. *Ditto, Inc.*, 91 F. 2d 1, 4 (C. C. A. 7); *Kelliher* v. *Stone & Webster*, 75 F. 2d 331, 335 (C. C. A. 5); *Vogel* v. *New York Life Insurance Co.*, 55 F. 2d 205, 208 (C. C. A. 5), certiorari

B. THE RECORD OF THE FIRST TRIAL FAILS TO ESTABLISH THAT THE JURY NECESSARILY FOUND THAT PETITIONER HAD NOT ENTERED INTO A CORRUPT AGREEMENT WITH THE GREENBERGS ALONE

Applying the above principles in this case, we think it is clear that the acquittal on the conspiracy charge cannot form the basis of an estoppel because the jury had before it alternate grounds on which to reach its conclusion and it is impossible to tell from the record of the first trial on just what basis the judgment of acquittal rests. Petitioner contends that the first trial definitely determined that his letter of March 3d, the crucial factor at the second trial, was not written pursuant to a corrupt agreement with the Greenbergs, and hence that, on the second trial, the jury should not have been allowed to find that the letter was written pursuant to such an agreement. He argues (Pet. 5) that the only issue submitted to the jury on the first trial was whether petitioner had entered into a conspiracy with the Greenbergs. We submit that the record of the first trial fails to establish that such was the only possible basis for the jury's verdict, and that the jury could have acquitted the petitioner even though it found that the March 3d letter was written pursuant to a corrupt agreement with the Greenbergs. The acquittal at the first trial can, we believe, be held at most to establish only one

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denied, 287 U. S. 604; *United States* v. *Halbrook*, 36 F. Supp. 345, 349–350 (E. D. Mo.), and cases cited; see also Freeman, *Judgments*, 5th ed., vol. 2, pp. 1365, 1455, 1460.

fact, that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and the S. J. Baron Corporation.

While the district judge indicated that the verdict of acquittal might have been based on the failure of the jury to find the commission of an overt act (R. 75, 77, 78), we do not think there is any real basis for such a conclusion, whether the jury gave consideration only to a conspiracy involving petitioner and the Greenbergs or to a more extended one involving also the Baron Corporation. There was no denial of the commission of any of the overt acts alleged which were attributable to either type of conspiracy—delivery of the Baron letter and petitioner's letter of March 3d, filing of false applications, etc. We do think, however, that the record of the first trial very clearly establishes that the entire case was predicated on the theory that petitioner was party to an over-all conspiracy extending beyond his immediate transactions with the Greenbergs and involving parties other than petitioner and the Greenbergs, that the case was submitted to the jury on that theory, that the jury was never definitely or even impliedly told that petitioner could be convicted even if he was not a party to the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater, possibility that

the jury was impelled to return the verdict of acquittal on a finding that petitioner was not a party to the over-all fraud, as on a finding that petitioner did not write the March 3d letter pursuant to an agreement with the Greenbergs for the purpose of enabling the Greenbergs to deceive the rationing board.

In addition to petitioner and the Greenbergs and their corporation, the indictment named four others, including the Baron Corporation, as defendants. It recited overt acts committed by defendants other than the Greenbergs and petitioner, as well as overt acts by one of the Greenbergs not relating to any of the defendants. There can be no question that it was the theory of the indictment that all the persons named therein as defendants were copartners in a comprehensive, continuing fraud. And there can be no doubt that the Government presented its case on the basis of that theory. A considerable portion of the testimony and documentary evidence related to the defendants as to whom a verdict of acquittal was directed, to the Baron Corporation, and to the Greenbergs' transactions with corporations not indicted. Further, as the case finally evolved, the summations of counsel invited the jury to give thought to the duration of the scheme, the Greenbergs' other frauds, and the relationship of the Baron transactions to a conspiracy common to petitioner, the Greenbergs and the Baron Corporation. As set forth in the

Statement (*supra*, p. 9), the Government had introduced in evidence a letter similar to petitioner's letter of March 3d, written by the Baron Corporation, which had pleaded *nolo contendere* and was not on trial, and had produced evidence as to the negotiations between the Greenbergs and the broker for the Baron Corporation preceding the writing of that letter. The Government had also introduced evidence of the Greenbergs' fraud relating to sugar products allegedly delivered to corporations not named in the indictment (*supra*, pp. 6–7), on the theory that this showed the prior existence of the plan which petitioner knowingly joined. Government counsel referred to that evidence in his summation and asked the jury to infer the existence of a common plan from the similarity between the Greenbergs' transactions with Baron and their transactions with petitioner. (See Statement, *supra*, pp. 11–12). Defense counsel, on the other hand, stressed the fact that Greenberg had started to defraud the rationing board before petitioner's letter of March 3d was written. He made a definite point of the fact that the evidence failed to show a connection between his client and the Baron Corporation, and he said (Tr. 538–539):

> We decline to be responsible for any of their [the Baron's] activities with the Greenbergs or the activities of any other persons and the Greenbergs.

His point was a good point, as the recent decision of this Court in *Kotteakos* v. *United States*, 328 U. S. 750, establishes.[12] How can we say that it did not impress the jury?

It is also clear that the judge submitted the case to the jury on the theory that they could find that petitioner was a party to the over-all fraud. He allowed the evidence of the Greenbergs' other frauds and dealings with persons other than petitioner, including the Baron Corporation, to go to the jury. As a matter of fact, although he said that he was going to tell the jury to disregard the testimony relating to the Royal Crown companies and William C. Franklin, their president, the defendants as to whom he directed an acquittal (Tr. 507–508), he never actually did so.[13] His entire charge is keyed to the conviction, which he had earlier voiced (Tr. 506–507), that the jury could find that petitioner was part of an over-all conspiracy embracing the Baron Corporation. He said (Tr. 565):

> You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if

[12] In that case, it will be remembered, a single conspiracy was charged, but in proof it turned out to be several distinct conspiracies having a common center, spokes, but no rim, and the variance was held to be fatal.

[13] In his charge he merely told the jury to return a verdict of not guilty as to them (Tr. 563).

you should find that there was no conspiracy, that would end the matter completely.

He went on to say (Tr. 565–566):

> In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will apply.
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> * * * * *
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> It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite.

And further (Tr. 567):

> I have told you that it is necessary that a common purpose be shown, a purpose to effect something, some end or aim, which purpose is common to all. Now, how that may be shown is a matter to be determined from the evidence. It may, of course, be inferred where the parties concerned are pursuing the same object and adopt means leading to the same unlawful result. It is not necessary that all of the alleged conspirators know all and each of the other alleged co-conspirators, or be acquainted with them.

Later, after giving the charge that acts of persons found to be members of a conspiracy are ad-

missible against all even though each does not know of the others' acts (Tr. 568), the judge said (Tr. 569):

> I shall repeat to you that the common design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned insofar as the objects of the conspiracy are concerned.

Clearly, we think the jury could well have received the impression that they had to find that petitioner was a knowing party to the whole general conspiracy submitted to them.

Perhaps even more significant in this respect than what the judge actually said is what he failed to say. We have looked in vain throughout the charge for any direct statement, or any statement which could fairly be read as implying, that the jury could convict petitioner of the offense charged if they found that, although he was not a party to the Greenbergs' whole crime, he was implicated to a more limited extent. The only statement to which petitioner refers as support for his theory that the verdict determined that he did not enter into a corrupt agreement with the Greenbergs alone is the judge's reading of his request No. 12 (Tr. 578) to the effect that—

> If upon a consideration of all the evidence you entertain a reasonable doubt as

> to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

But the judge also said, "That I have already charged, but I will repeat it."

It is impossible, we think, to read this portion of the charge, in its setting, as an instruction to the jury that they could find petitioner guilty of a limited conspiracy with the Greenbergs based on the March 3d letter. It is as much a charge on reasonable doubt as on the facts, and the judge seems so to have understood it since he stated that he had already given the charge and there had been no charge on specific facts. Indeed, of the twelve requests to charge, the 12th request was one of eight which specifically dealt with reasonable doubt (Tr. 584–586), as to most of which the judge indicated that he had already charged in substance (Tr. 576–578). Four requested instructions on reasonable doubt (2d to 5th, Tr. 584–585), which the judge rejected because he had already covered them in his charge or would not charge in the language requested (Tr. 576), were quite analogous to the 12th. Furthermore, the 12th request, very properly, told the jury that they must at least find an agreement with the Greenbergs, that if they did not find that much they must acquit, but the charge did not tell them

that if they found that much, such finding in itself was enough to convict.

Reading the charge as a whole, particularly in the light of the range of the evidence adduced at the trial, we think the jury might very well have understood that in order to convict they had to find that petitioner was a knowing party to the over-all fraud of the Greenbergs. But because of the failure of the evidence directly to connect petitioner with the Greenbergs' fraud in the Baron transactions or in their initial transactions, the jury might very well have declined so to find despite the judge's instructions. As we have indicated, such a conclusion is legally correct under the *Kotteakos* case. It is important to remember that the jury is not solely a fact-finding body. The jury is a body which also has the function of applying to the facts as it finds them the legal principles as to which they are instructed by the judge. See the full discussion of this subject in *Morris* v. *United States,* 156 F. 2d 525 (C. C. A. 9). In this case, the jury could very well have found that petitioner entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d, and still conclude, under their law-applying function, that they ought not to hold petitioner guilty since they did not think he was a party to the broader conspiracy to which their consideration was invited. It is true that they might also have found that petitioner did not write the letter of March 3d

pursuant to agreement with the Greenbergs for the purpose of enabling the Greenbergs to defraud the rationing board. But they did not necessarily have to find that fact to reach their verdict. Whether the verdict rested on one ground or the other, or on some entirely different and less rational basis, neither we nor petitioner nor this Court can determine. All that we know is that the jury found that petitioner was not a party to the over-all fraud as to which they were called upon to pass. Applying the doctrine of estoppel, we may take it as established that petitioner was not party to a conspiracy involving the Greenbergs and the Baron Corporation. But since innocence of that conspiracy is not necessarily incompatible with knowing assistance to the defrauding of the rationing board by the Greenbergs, the acquittal on the first trial cannot be taken as in any way establishing that petitioner did not enter into an agreement with the Greenbergs pursuant to which he wrote the letter of March 3d for the specific purpose of enabling the Greenbergs to obtain and sell to him sugar in the form of syrup to which he was not entitled.

The verdict of acquittal may be taken as establishing that the whole offense presented to the jury was not proved, but it is not proof one way or the other as to any component part of that offense. That is made abundantly clear by the decision of this Court, through Mr. Justice Holmes, in *United States* v. *Adams*, 281 U. S. 202.

There the defendant had been acquitted of making false entries in the books of a federal reserve bank of which he was president, with intent to defraud the bank and the bank examiners, and the making of the entries was apparently not disputed. He was subsequently indicted for making false entries in a financial report of the condition of his bank. After pointing out that the first trial would not sustain the plea of double jeopardy since the offenses were different, but that the doctrine of collateral estoppel would apply, Mr. Justice Holmes said (p. 205):

> * * * It [the judgment of acquittal] establishes that at the time of making the entries, the defendant was not guilty of an intent to defraud the bank or the examiners. It does not establish that the entries were true, although that might have been a ground for the verdict. *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles,* 5 Wall. 580. *De Sollar* v. *Hanscome,* 158 U. S. 216, 221, 222. An alternative possible ground is that although the entries were untrue the defendant believed them to be true or for some reason believed them to be justified.

Reading that statement, in the light of the cases cited, which we have discussed, *supra,* pp. 29–31, it is clear that *United States* v. *Adams* means that, where the grounds for the verdict are uncertain, the verdict can be taken as establishing only the defendant's innocence of the entire issue that was

submitted to the jury for determination; that a court cannot speculate as to which possible basis the jury relied upon in reaching its conclusion. Hence, in this case, the verdict established that petitioner was not part of a general conspiracy with the Greenbergs and others; it did not establish that he had not entered into a corrupt agreement with the Greenbergs, pursuant to which he wrote the letter of March 3d.

At the second trial, the Government was not required, in order to establish petitioner's guilt as an aider of the substantive offenses charged, to show that petitioner participated in a conspiracy involving persons other than the Greenbergs. It was required to show only that he knowingly assisted in the presentation of false invoices to the rationing board. It showed that by proving that petitioner originated the idea of using the name of the Brooklyn Navy Yard, that he wrote the letter of March 3d, which was false, for the express purpose of enabling the Greenbergs to use that letter, if needed, to show deliveries to an exempt agency, and that he received the benefits of the fraud perpetrated on the rationing board. Since none of the facts upon which the Government relied to establish guilt at the second trial were necessarily determined by the acquittal at the prior trial, the principle of collateral estoppel never came into play.

Petitioner, relying on the doctrine of collateral estoppel, has the burden of proving that the

identical issues as to which he seeks to bar proof, were definitely determined at the prior trial. *National Lead Co.* v. *Nulsen,* 131 F. 2d 51, 56 (C. C. A. 8), certiorari denied, 318 U. S. 758; *Vogel* v. *New York Life Insurance Co.,* 55 F. 2d 205, 207 (C. C. A. 5), certiorari denied, 287 U. S. 604. As we have shown, the prior record fails to establish that the jury necessarily found that the letter of March 3d was not the result of a corrupt agreement between petitioner and the Greenbergs. Hence, the judge very properly refused to take the acquittal at the first trial as evidence of such fact and properly declined to allow petitioner to present the acquittal to the jury as evidence of such fact. Accepting the doctrine of collateral estoppel as applicable to successive criminal prosecutions, the judge correctly ruled that it was inapplicable here.

CONCLUSION

For the reasons indicated, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 174.—October Term, 1947.

Robert Sealfon, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 5, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved.

Two indictments were returned against petitioner and others. One charged a conspiracy to defraud the United States of its governmental function of conserving and rationing sugar by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies.[1] The other indictment charged petitioner and Greenberg with the commission of the substantive offense,[2] *viz.*, uttering and publishing as true the false invoices. The conspiracy indictment was tried first and the following facts were shown:

Defendant Greenberg manufactured syrup and approached Sanford Doctors, a salesman for a brokerage concern, to sell vanilla syrup. Doctors negotiated some sales to petitioner who did a wholesale business under the name of Sero Syrup Co. Thereafter Greenberg asked Doctors to get a list from petitioner showing the places where petitioner made sales and told him that if any sales

[1] See § 28 Criminal Code, 18 U. S. C. § 72.

[2] See § 332 Criminal Code, 18 U. S. C. § 550.

were made to exempt agencies, Greenberg could sell to petitioner in larger quantities. Doctors so informed petitioner and some time thereafter petitioner wrote to Greenberg saying, "at the present time some of our syrups are being sold at the Brooklyn Navy Yard" and various defense plants. Petitioner did sell some of his syrup to a vending company which had machines at the Navy Yard but it was not vanilla syrup and no sales were made to the Navy Yard as such. Greenberg thereafter presented a series of false invoices to the ration board purporting to show sales to petitioner for delivery to the Navy Yard. Petitioner's letter was never shown to the board. On the basis of these invoices Greenberg received replacement certificates for 21 million pounds of sugar, 10 million of which he sold to petitioner in the form of vanilla syrup, and which was by petitioner sold to non-exempt consumers, mostly the National Biscuit Company. Petitioner at first made payments to Greenberg by check but thereafter gave checks to his trucker which the latter cashed, deducted his trucking fee, and paid Greenberg.

The jury returned a verdict of not guilty as to petitioner.[3] Thereafter a trial was had on the other indictment which charged petitioner and Greenberg with uttering and publishing as true the false invoices introduced in the conspiracy trial. Greenberg pleaded guilty and the trial proceeded against petitioner on the theory that he aided and abetted Greenberg in the commission

[3] The conspiracy indictment also named Leo and Murray Greenberg, Fresh Grown Preserves Corporation in which the Greenbergs were officers (all of whom we refer to simply as Greenberg), the S. J. Baron Corporation, the Royal Crown Bottling Co. of Baltimore, Inc., Royal Crown Bottling Co. of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. Greenberg pleaded guilty, Baron Corporation pleaded *nolo contendre*, and verdicts were directed for Royal Crown and Franklin. It was charged that the Baron Corporation participated in the conspiracy by writing a letter similar to that written by petitioner, discussed hereafter.

of the substantive offense. The false invoices, the letter from petitioner to Greenberg, and essentially the same testimony were again introduced against petitioner. In addition, it was brought out on cross-examination that petitioner had unsuccessfully sought replacement certificates from his ration board for sugar contained in syrups sold at the Navy Yard and defense plants. Greenberg gave testimony from which the jury could conclude that petitioner was a moving factor in the scheme to defraud which was constructed around petitioner's letter and that he was familiar with Greenberg's intention to submit false invoices. Greenberg further testified that petitioner received $500,000 in cash under the agreement as a rebate of two cents a pound on all replacement sugar which Greenberg received on Navy Yard invoices whether or not it was used in syrup sold to petitioner. This time the jury returned a verdict of guilty and petitioner was sentenced to five years' imprisonment and fined $12,000.

Petitioner moved to quash the second indictment on grounds of double jeopardy (abandoned in this Court) and *res judicata*, and also objected to the introduction of the evidence adduced at the first trial. The district judge ruled against petitioner, and the court below affirmed. 161 F. 2d 481. We granted the petition for a writ of certiorari because of the importance of the question to the administration of the criminal law.

It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U. S. 640, 643. Thus, with some exceptions, one may be prosecuted for both crimes. *Ibid.* But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87; *United States* v. *De Angelo*, 138 F. 2d 466, 468: 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334) and operates to

conclude those matters in issue which the verdict determined though the offenses be different. See *United States* v. *Adams*, 281 U. S. 202, 205.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.

Respondent argues that the basis of the jury's verdict cannot be known with certainty, that the conspiracy trial was predicated on the theory that petitioner was a party to an over-all conspiracy ultimately involving petitioner, Greenberg, and the Baron Corporation.[4] Thus it is said that the verdict established with certainty only that petitioner was not a member of such conspiracy, and that therefore the prosecution was not foreclosed from showing in the second trial that petitioner wrote the letter pursuant to an agreement with Greenberg to defraud the United States. The theory is that under the instructions given the jury might have found that petitioner conspired with Greenberg and yet refused to infer that he was a party to the over-all conspiracy.

The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict. Cf. *De Sollar* v. *Hanscome*, 158 U. S. 216, 222. Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must

[4] See note 3, *supra*.

be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well.[3] Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

Reversed.

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[3] That was the view of the judge who tried both cases. At the second trial he characterized as follows the charge and the verdict at the first: ". . . what was tried on the 11th of December was a charge of conspiracy and what the jury by its verdict determined was that Sealfon had not entered into common agreement with the Greenbergs and the Fresh Grown Company to violate the law."